

## 21E PROGRAM - Historical Perspective

In the late 1960s, Massachusetts launched a limited program for responding to oil spills that threatened bodies of water. The Commonwealth established broader authority and additional resources to more aggressively target contaminated sites and spill emergencies when Chapter 21E of the General Laws- the state Superfund statute- was enacted in 1983.

Chapter 21E gave the Department of Environmental Protection (DEP) the task of ensuring permanent cleanup of oil and hazardous material releases, determining who is legally responsible for them, and requiring those parties to do the work or reimburse the Commonwealth for cleanup costs.

In 1986, Massachusetts voters overwhelmingly approved a binding ballot question that gave DEP specific deadlines and quotas for finding and assessing hazardous waste sites, securing their timely cleanup, and expanding public participation the process. But these new requirements lead to bureaucratic and environmental gridlock. The program was predicated to direct DEP oversight of assessment and cleanup work—something the agency was never given the necessary funding to provide.

By 1990, the number of known and suspected sites across the Commonwealth far outstripped DEP's ability to oversee responses at all of them. Fewer than one-quarter of the hazardous waste sites in Massachusetts were being worked on actively and only a handful of cleanups were being completed in any given year. Everyone with an interest in the program agreed that a new approach was needed.

So, DEP formed a public/private 21E Study Committee to determine what government sector each did best and to develop a new vision—one ultimately shared by all major stakeholders—or accelerating cleanups without compromising environmental standards. New legislation in 1992 revised Massachusetts Contingency Plan (MCP) regulations in 1993 expanded the private sector's role for most sites and on those tasks that government needed to perform.

### The New Approach

A corner stone of the new program was the creation of Licensed Site Professionals (LSPs)—environmental experts licensed by an independent Board of Registration who have a minimum level of competence in site assessment and cleanup. Just as people hire attorneys to give them legal advice or accountants to prepare their tax returns, people conducting response actions hire LSPs to manage cleanups and provide opinions that site work meets state requirements—in most cases without DEP involvement. The agency audits the results at approximately 20 percent of these sites annually to ensure adherence to state cleanup standards.

Sites not permanently cleaned up within one year are scored using the MCP's Numerical Ranking System and classified as Tier I or Tier II to determine the subsequent level of DEP oversight. Tier II site may proceed with cleanup without DEP involvement. Tier I sites require a permit to proceed, and most complicated of these, Tier IA, require direct agency oversight.

The new program employs performance standards rather than traditional “command and control” techniques to obtain desired results without micro-management by DEP.

Private parties benefit from clear rules, and from a process that leaves the pace up to them and gives them more flexibility to tailor cleanups. New incentives for quickly reducing risks and achieving permanent solutions also give them opportunity to lower cleanup costs. Citizens benefit from the increased pace of cleanup because the duration of their potential exposure to contamination is reduced. The Commonwealth benefits because the new program is more efficient, enabling DEP staff to focus on those sites that pose the most serious risks to public health and the environment.

### Clear Notification Thresholds

The original MCP included criteria for reporting sudden releases of oil and hazardous materials, but provided no guidance on reporting ‘historical’ contamination. Uncertain about what DEP would consider significant but wanting to comply with the law, private parties would report even tiny trace amounts. As a result, there was exponential growth in the backlog of reported sites waiting to receive a clean bill of health from DEP.

Revisions to the MCP ended the uncertainty by establishing Reportable Concentrations (RCs)—clear thresholds for determining contaminate levels in soil and groundwater that could pose significant risks and therefore should be reported to DEP.

*Different Route, Same Destination*

When DEP, the private sector, and public interest/ environmental advocates agreed to work together on the 214E redesign, they decided that regardless of its ultimate shape, the new program would have to be predicted on five long-standing principles:

- ✧ DEP needs or know about releases of oil and hazardous material to the environment.
- ✧ Sites should be permanently cleaned up in a timely manner.
- ✧ It is DEP's job to ensure that assessment and cleanup are done properly.
- ✧ Those legally responsible should pay their fair share of cleanup costs.

*SITE SCORECARD*

**In the first two years of the program, the private sector ranked 803 sites using DEP's Numerical Ranking System, with these results:**

<b>Tier II.....</b>	<b>710 (88.4 %)</b>
<b>Tier IC.....</b>	<b>77 (9.6 %)</b>
<b>Tier IB.....</b>	<b>15 (1.9 %)</b>
<b>Tier IA.....</b>	<b>1 (0.1 %)</b>

DEP had originally estimated that about 70 percent of the sites requiring classifications would score as Tier II.

# **ADVERTISING**

**Overview:** State regulations and the REALTORS® Code of Ethics set forth certain requirements and restrictions relating to real estate advertising by licensed brokers. Although not heavily regulated, brokers should use great discretion in their advertising techniques in order to preserve their integrity and the reputation of the real estate community in general advertising techniques in order to preserve their integrity and the reputation of the real estate community in general.

**Relevant Law:** 254 CMR 2.00 (Board of Registration of Real Estate Brokers and Salesmen Regulations)  
REALTORS® Code of Ethics and Arbitration Manual, Standard of Practice 12

## **Important Issues:**

### **Regulatory Requirements**

- Every broker when advertising real estate shall clearly identify themselves as the advertising broker and not as a private party. Advertisements may not only contain a post office box number, telephone number or street address. 254 CMR (2.04(1)).
- Salesmen are prohibited from advertising to purchase, sell, lease, or rent any property unless done under the direct supervision and under the name of the broker by whom he/she is engaged. 254 CMR (2.04(2)).
- No broker shall advertise property in any way which directly or indirectly discriminates unlawfully against any person or group because of race, creed, color, or national origin. 254 CMR (2.04(3)).

### **Code of Ethics Requirements**

- REALTORS® shall not offer a service described as “free of charge” when rendering of a service is contingent on the obtaining of a benefit such as a listing or commission. (Standard of Practice 12-1)
- REALTORS® may represent that their services are free or without cost if they expect to receive compensation from any source other than their client provided that the potential for the REALTOR® to obtain a benefit from a third party is clearly disclosed at the same time. (Standard of Practice 12-2)
- Although not per se unethical, the offering of premiums, prizes, merchandise discounts or other inducements to list, sell, purchase or lease are subject to the limitations and restrictions of state law and the ethical obligations established by any applicable Standard of Practice. REALTORS® must exercise care and candor in all advertising. (Standard of Practice 12-3)
- REALTORS® shall not offer for sale/lease or advertise property without authority to do so. (Standard of Practice 12-4)
- Authorized listing brokers or subagents may not quote a price different from that agreed upon with the seller/landlord. (Standard of Practice 12-4)
- REALTORS® shall not advertise or permit any persons employed by or affiliated with them to advertise listed property without disclosing the name of the firm. (Standard of Practice 12-5)
- When advertising unlisted real property, in which they have an ownership interest, REALTORS® must disclose their status as both owner/landlord and as broker. (Standard of Practice 12-6)
- Only REALTORS® who participated in the transaction as the listing broker or cooperative broker (selling broker) may claim to have “sold” the property. Prior to closing, a cooperative broker may post a “sold” sign only with the consent of the listing broker. (Standard of Practice 12-7)

Failure to comply with these requirements may result in suspension of brokers/salesmen license and suspension from the National Association of REALTORS®. Candor and discretion in advertising will protect brokers/salesmen from such sanctions. Consult legal counsel to ensure proper advertising techniques.

Frequently Asked Questions:

Q: What are the advertising restrictions on brokers and salesmen when they are advertising for sale or lease property in which they have ownership interest?

A: When advertising such property in an official capacity, brokers must identify themselves as both owner and broker. Otherwise, brokers and salesmen advertising property that they actually own have all the rights of the non-broker and non-salesman owner.

Q: What restrictions and requirements exist relative to the use of the REALTOR® mark?

A: The mark may be used on a Member's office and yard signs and in advertising provided such use conforms to the policies and guidelines set forth in the National Association of REALTORS® *Membership Marks Manual*. This manual contains specific instruction relating to proper use and format of the REALTOR® mark.

For more information please contact the following:

*Massachusetts Association of REALTORS® at (800) 370-LEGAL*

This publication is provided as a service to members of the Massachusetts Association of REALTORS® and is intended for educational use only. The Massachusetts Association of REALTORS® does not accept responsibility for any misinterpretation or misapplication by the reader of the information contained in this article. The publishing of this material does not constitute the practice of law nor does it attempt to provide legal advice concerning any specific factual situation. FOR ADVISE ON SPECIFIC LEGAL PROBLEMS CONSULT LEGAL COUNSEL.

# ASBESTOS

**Overview:** Asbestos is a naturally occurring material which is heat resistant. As a result, asbestos commonly used in building materials such as ceilings and floor tiles, insulation, pipe covering, and outdoor shingles. Scientists and public health officials have determined that exposure to asbestos that is in an unsafe condition may increase a person's risk of developing lung cancer and asbestosis, a fibrotic scarring in the lung. The use of asbestos has been generally prohibited since 1978. However, even if a building was constructed after 1978, it may still contain asbestos since older building materials may have been used in the construction. While experts recommend that asbestos in good condition and in an area where it is not likely to be disturbed be left alone, in certain situations the removal of asbestos-containing products is a health necessity. Numerous local, state, and federal authorities regulate the use, storage, transport, and removal of asbestos.

**Relevant Law:** M.G.L. Chapter 149  
M.G.L. Chapter 93A  
310 CMR 7.00  
105 CMR 40.353(D) (Massachusetts Sanitary Code)  
453 CMR 6.12  
310 CMR 40.000  
National Environmental Standards for Hazardous Air pollutants Program (NESHAP), 40  
CFR part 61, subpart 7 (40 CFR 61.145)

## **Important Issues:**

- For any demolition, handling, renovation, or disposal involving asbestos-containing materials, which are friable or containing 1 percent or more asbestos by weight, the building owner or contractor must contact the Massachusetts Department of Environmental Protection (DEP) 20 days prior to performing the work. (See 310 CMR 7.00)
- Under the state sanitary code, if asbestos is to be removed, an owner must submit an asbestos removal plan which must be approved by the local board of health prior to commencement of the removal process.
- If there is more than 3 linear feet of asbestos on pipes or 3 square feet on of the structures, the contractor must notify Massachusetts Department of Labor and Industries (DLI) at least 10 days prior to beginning work. (See CMR 6.12).
- The owner or contractor must notify the DEP if the asbestos is equal or greater than the reportable quantity specified in 310 CMR 40.900
- The owner must notify the U.S. Environmental Protection Agency (EPA) if the amount of asbestos exceeds 160 cubic feet or 260 linear feet under the National Environmental Standards for Hazardous Air Pollutants program (NESHAP). (See 40 CFR Part 61, subpart 7).

Special asbestos disposal requirements also apply. Asbestos may only be disposed of in Massachusetts municipal landfills that have been approved by the local board of health or in two commercial landfills located in Chicopee, MA. Special transport requirements are also required by federal regulation. Additional requirements regarding the treatment of asbestos exist. Consult legal counsel to ensure complete compliance with all local, state, and federal requirements.

### Does asbestos have to be removed?

If asbestos is in good condition and it does not pose a health hazard, no laws or regulations require that it be removed. However, building owners are required to keep asbestos in good condition to prevent releases of visible or particle asbestos emissions under state and federal regulations.

### Are some asbestos and asbestos-containing products more dangerous than others?

All asbestos that is in an unsafe condition may be dangerous to a person's health. However, the manner in which the asbestos is maintained or packaged will drastically effect the level of exposure that will occur. Asbestos and asbestos-containing materials are usually classified into two categories. Friable asbestos products are materials that can easily crumble. This type of asbestos is considered the most dangerous because asbestos particles easily become airborne and enter the human ventilation system. Nonfriable products typically contain bonding agents like cement and plastics that prevent asbestos from being released into the air. Asbestos particles may still be released, however, through activities such as sanding and drilling.

How is it determined that a building contains asbestos?

The Massachusetts Department of Labor and Industries licenses asbestos professionals to determine if asbestos is present and whether removal/repair is necessary. Only state-licensed and state-certified asbestos abatement contractors and workers are authorized to perform related work in Massachusetts.

For more information please contact the following:

Massachusetts Association of REALTORS® at (800) 370-LEGAL  
Massachusetts Department of Environmental Protection at (617) 292-5500  
Massachusetts Department of Public Health at (617) 727-2660  
U.S. Environmental Protection Agency, Region I at (617) 565-3836  
U.S. Environmental Protection Agency, Asbestos Hotline at (202) 554-1404

# PERSONAL ASSISTANTS

The Massachusetts laws that govern the actions of licensed real estate agents state: "no person shall engage in the business of or act as a broker or salesman directly, or indirectly, either temporarily or as an incident to any other transaction, or otherwise, unless he is licensed."

## NOTES

This list should not be construed as to exclude a Personal Assistant from conducting the clerical and administrative aspects in any of the aforementioned tasks.

While some of the areas outlined in this pamphlet could be considered "gray areas" (permissible under the direct supervision of a broker), this list is intended to guide brokers with the decision-making process of assigning duties and responsibilities to assistants.

The Designated REALTOR® dues formula is based upon the number of licenses affiliated with a Member Firm. A licensed Personal Assistant falls under the Designated REALTOR® dues formula. Licensed Personal assistants are invited to membership in the North Central Massachusetts Association of REALTORS® where they may avail themselves of the many services and benefits of North Central Massachusetts Association of REALTORS®, MLS Property Information Network, Massachusetts Association of REALTORS® and National Association of REALTORS®.

Generally, unlicensed assistants should avoid activities that will bring them into direct contact with clients and customers.

Unlicensed personal assistants may not provide information about the property or the listing to any prospective home purchaser, home inspector, appraiser, or other persons. All inquiries must be directed to the listing broker.

## Unlicensed Personal Assistant's **may...**

1. Prepare daily work schedule.
2. Screen telephone calls.
3. Prepare materials for listing presentation.
4. Schedule listings for tour.
5. Handle various computer functions, in-house.
6. Prepare lists of expired listings with telephone number.
7. Prepare comparative list of mortgage rates.
8. Coordinate (on behalf of broker) appointments.
9. Confirm appointments.
10. Coordinate mailing lists.
11. Coordinate mailing.
12. Send mailing to centers of influence.
13. Handle correspondence.
14. Photograph listings.
15. Put up/take down FOR SALE signs.
16. Pick up/return keys for homes to be shown.
17. Coordinate appointments for home showing.
18. Organize prospect card file.
19. Prepare materials for farming activities.
20. Update lists for farming purposes.
21. Set-up lock box.
22. Put up/take down SOLD signs.
23. Coordinate materials for FSBO leads.
24. Write/monitor ads.
25. Coordinate various paperwork to local MLS and handle various computer tasks.
26. Coordinate bank appointments and follow-up on loans in process.
27. Coordinate appointments for various inspections.
28. Coordinate drafts of materials for appraiser.

29. Coordinate delivery of materials to attorney.
30. Coordinate appointments for final reading.
31. Prepare checklists to monitor the process of a purchase/sale.
32. Coordinate date and time for closing.
33. Confirm date and time for closing with buyer/seller.
34. Purchase and/or deliver closing gifts.
35. Attend sales meeting.
36. Prepare materials for Open Houses.
37. Pick up MLS books and materials.
38. Coordinate materials for re-location packages.
39. Coordinate the mailing of special occasion cards to prospects, buyers and sellers.
40. Develop promotions.
41. Mail special promotions.
42. Prepare flyers and distribute to other offices.
43. Coordinate materials to notify neighbors of new listing, solds, open house, etc.
44. Send mailing to a farm area.
45. Conduct clerical and administrative tasks on routine correspondence and record keeping for licensee.

Unlicensed Personal Assistant's **may not...**

1. Do listing presentations.
2. Write contracts.
3. Write purchase offers.
4. Negotiate offers.
5. Contract expired listings.
6. Show houses.
7. Call for feedback from co-brokers after showing.
8. Contact seller(s) and notify of showing results.
9. Contact existing buyers.
10. Service listing.
11. Preview houses for prospective buyers.
12. Negotiate counter-offers.
13. Contact buyers and sellers in follow-up function.
14. Call FSBO's.
15. Meet with mortgage lenders and buyers.
16. Meet with mortgage lenders and attorneys.
17. Assist home inspectors at property.
18. Assist appraisers at property.
19. Assist inspection for smoke alarm certificate.
20. Contact buyers and notify of settlement costs.
21. Attend closing.
22. Attend property walk-throughs.
23. Conduct Open Houses.
24. Participate in other offices Open Houses.
25. Attend Broker Open Houses.
26. Conduct Broker Open Houses.
27. Contact referrals on initial meeting.
28. Farm a neighborhood in person.
29. Show rental apartments to prospective tenants. (as a representative of a broker)
30. Prepare draft of comparative market analysis.

# **BROWNFIELDS**

## **Summary of the Brownfields Act: Chapter 206 of the Acts of 1998**

“An Act Relative to Environmental Cleanup and Promoting the Redevelopment of Contaminated Property”

On August 5, 1998 Governor Cellucci signed into law the “Brownfields Act”, establishing new incentives to encourage parties to clean up and redevelop contaminated property in Massachusetts. This Act will provide liability relief and financial incentives to attract new resources for these properties, while ensuring that the Commonwealth’s environmental standards are met. Major features of the Act are summarized below.

### **LIABILITY RELIEF**

1. *“Innocent” Owners and Operators: Ends liability for “innocent” owners and operators once they meet DEP’s cleanup standards for oil or hazardous material releases. Defines “eligible person” as an owner or operator who did not own or operate the site at the time of the release and who did not cause or contribute to the contamination of the site. Once a permanent cleanup or remedy operation status is achieved, an eligible person is protected from Commonwealth claims for response action costs and natural resource damages and from claims by third parties for contribution, response action costs and property damage under c. 21E and property damage under common law.*

- The owner must clean up soil contamination within his property boundaries to DEP standards. If the property includes the source of groundwater or surface water contamination, the owner must clean up the water-borne contamination to DEP standards.
- The liability protection extends to subsequent property owners who maintain the site’s clean status or the on-going cleanup remedy.
- An eligible person who starts a cleanup but transfers the property before completion of the cleanup is protected from liability once a subsequent eligible person achieves a permanent solution or remedy operation status, as long as the initial eligible person complied fully with c. 21E and its regulations while he owned or operated the site.

2. Downgradient Property Owners: Exempts certain owners and operators from liability for contamination that has migrated onto their property. Owners and operators are eligible if they have had no connection with the property that contains the source of the contamination and they did not cause or contribute to the contamination. If the source is unknown, the owner or operator has a defense to liability, rather than an exemption. The exemption or defense is available as long as the owner or operator notifies DEP of the release, provides access to people who clean up, prevents exposure to the contamination, controls risks from imminent hazards, does not impede or interfere with the performance of response actions and does not exacerbate the release of oil or hazardous material.

3. Tenants: Exempts certain tenants from operator liability if their tenancy began after the release was reported to DEP and they did not cause or contribute to the contamination. To maintain this exemption the tenant must provide access to the site (or the portion it controls) to people who are cleaning up, prevent exposure to the contamination, control risks from imminent hazards, and contain any further release or threat or release from a structure or container under its control. If the tenant uses oil or hazardous materials similar to those found on the site, the tenant would need to show that he has not contributed to the contamination.

4. Redevelopment Authorities and Community Development Corporations (CDC): Exempts redevelopment agencies and authorities, CDCs and Economic Development and Industrial Corporations (EDICs) from liability as long as they acquire the property after August 5, 1998, did not cause or contribute to the contamination, notify DEP of the release, provide access to people who are cleaning up, prevent exposure to contamination, and take immediate response actions where needed. To maintain this exemption these agencies must act diligently to divest themselves of the property. The agencies are retroactively exempted from liability for sites acquired before August 5,

1998, provided that they meet the above requirements and notify DEP of any releases on these sites before the end of a six month amnesty period that will be established by DEP.

5. Secured lenders: Expands and clarifies the existing exemption. Replaces the “participation in management” liability standard with a causation standard and deletes the 5-year limit on the exemption after the secured lender takes ownership or possession of the property. Clarifies duties required to maintain the exemption after taking ownership or possession of contaminated property (e.g. by foreclosing); lenders have to prevent exposure to oil or hazardous materials, provide access to parties conducting response actions, respond to imminent hazards and substantial release migration conditions, and act diligently to divest. Lenders also must provide notice of contamination of DEP and to prospective buyers prior to public foreclosure auction.

6. Government Bodies or Charitable Trusts: Exempts to governmental bodies or charitable trusts who hold property restrictions created for the public benefit pursuant to c. 184, section 32 (conservation, agriculture preservation, watershed preservation and affordable housing restrictions).

7. Activity and Use Limitations (AUL): Protects owners and operators from liability for future violations when their permanent solution or remedy operation status includes an AUL and they transfer the property to a new owner. If a violation of the AUL occurs after transfer, the former owner would be relieved from liability to the Commonwealth under c. 21E and to third parties for contribution, response action costs for property damage under the common law for claims that arise from the violation. The third party relief is not available to owners or operators who have cleaned up pursuant to RCRA or CERCLA, who were subject to outstanding administrative or judicial enforcement actions when they transferred the property, or who failed to record an AUL in accordance with c. 21E and its regulations.

8. Contribution Protection: Clarifies the existing contribution protection provisions regarding notice and matters addressed in the settlement. The legislation also changes the provision to provide contribution protection from any person who has had an opportunity to *comment on* the settlement instead of any person who has had an opportunity to *join in* the settlement.

9. Brownfields Covenant Not to Sue: Establishes a “Brownfields Covenant Not To Sue” for parties who are redeveloping contaminated properties and do not qualify for the statutory liability relief described above. Priority for these covenants is given to projects in the 15 municipalities with the highest poverty rates, second to projects located in other Economically Distressed Areas (EDA), and finally to sites in all other municipalities. Under this provision, the party who does the clean up and redevelopment can enter into an agreement for liability relief from the commonwealth and third parties under Chapter 21E and for property damage under common law. The project must contribute to the economic or physical revitalization of the community in which it is located. The Attorney General’s Office will write regulations to implement this program.

## FINANCIAL INCENTIVES

### 1. Redevelopment Access to Capital

Overview: The purpose of the Redevelopment Access to Capital (RAC) program is to encourage private sector lending on contaminated sites throughout the Commonwealth. The program, administered by the Massachusetts Business Development Corp. (MBDC), is designed to address lenders concerns the (1) cost overruns incurred during cleanup might impede the borrower’s ability to repay a loan; and (2) contaminated land is “impaired collateral” with reduced value.

The program will back private sector loans with environmental insurance to ensure that the cleanup is completed, the loan is repaid and the collateral is restored to its “clean” value. The environmental insurance would be used to keep projects running. However, when the insurance is not adequate to address unanticipated environmental problems, RAC loan guarantees would be used to pay off the loans.

Program Funds: \$15 million appropriation.

Eligibility: The RAC program assistance is available to borrowers throughout the state who borrow from “participating Massachusetts lenders” (lenders who have signed a participation agreement with MBDC) to fund a site assessment or cleanup at a 21E site in Massachusetts is eligible. The borrower does not have to be an “innocent” party. The program is available for loans on any contaminated site located in the Commonwealth.

Implementation: The borrower and lender will be required to contribute equal amounts (points) to the RAC reserve fund. The State, through MBDC, will make a matching contribution to the reserve fund. The reserve fund will purchase environmental insurance for each project, reducing insurance costs by pooling policies into a portfolio. The insurance will be used to fund anticipated environmental costs and preserve the borrowers ability to repay the bank. If unanticipated environmental costs are so large that the project cannot be completed, the fund will pay off the loan.

MBDC Contact Person: Peter Hollingworth (617) 350-8877

## 2. Brownfields Redevelopment Fund

Overview: The Brownfields Redevelopment Fund (BRF) is administered by MassDevelopment to provide low-interest loans and grants for site assessment and cleanup in “Economically Distressed Areas” (EDA). EDAs include all Economical Target Areas (ETAs), areas that meet the criteria for ETA designation, but have not been formally designated, and sites of former manufactured gas plants.

Program Funds: \$30 million appropriation. 30% of all BRF loans and grants must be used to fund site assessments.

Maximum Loan/Grant Per Project:

- Site assessments - \$50,000 (Note: Any applicant who receives funding for a site assessment and does not proceed with the project must transfer the site assessment results to DEP).
- Cleanup - \$500,000,
- Priority projects - \$2 million.

Eligibility:

- Proposed projects must be located in EDAs and must result in significant economic impacts in terms of new jobs or contribution to the economic or physical revitalization of the areas in which they are located.
- The BRF assistance must be necessary to make the project financially feasible.
- Applicant must be: (1) an “innocent” owner or operator or third party pursuant to Chapter 21E with respect to the assisted site, and (2) cannot be subject to any outstanding administrative or judicial environmental enforcement action with respect to any property located within the Commonwealth.

Funding Categories:

### (a) Grants

- Eligibility is limited to municipalities, redevelopment authorities and agencies, economic development and industrial corporations, community development corporations, and economic development authorities.
- Grant requires 20% matching funds from applicant.

### (b) Loans

- The applicant must provide matching funds in accordance with the BRF regulations.

### (c) Priority Projects

- Priority projects are designed by the MassDevelopment. Eligibility for priority project designation is limited to projects that have municipal financial support in the form of a grant, loan, or abated property taxes.

MassDevelopment Contact Person: Laura Shepherd (617) 451-2477

### 3. Brownfields Tax Credit

Overview: The Brownfields Tax Credit is designed to encourage private sector investment in the cleanup of contaminated sites in Economically Distressed Areas. A tax credit of 25% of cleanup costs will be available upon completion of the cleanup. A larger tax credit of 50% will be allowed for a more thorough cleanup, provided an incentive to go beyond minimum cleanup requirements.

Eligibility:

- The taxpayer must be an “eligible person,” (an owner or operator who did not own or operate the site at the time of the release and who did not cause or contribute to the contamination a the site.)
- Any taxpayer who owns or leases a contaminated site for business purposes.
- The site must be located in an Economically Distressed Area.
- The taxpayer must complete a cleanup on the site (submit a Response Outcome Statement or Remedy Operation Status document) prior to claiming the credit.

Allowable Tax Credit:

- A credit of 25% of the cleanup costs is allowed for a cleanup that achieves and maintains a permanent solution or remedy operation status that relies on an Activity and Use Limitation (AUL).
- A credit of 50% of the cleanup costs is allowed for a cleanup that achieves and maintains a permanent solution or remedy operation status that makes the site safe for unrestricted use (i.e. does not rely on AUL).

Limitations:

- Costs must be incurred between August 1, 1998 and January 1, 2005.
- Cleanup costs must be greater than 15% of the assessed value of the property prior to remediation
- The site must be reported to the Department of Environmental Protection.
- A credit may not be taken if the taxpayer received financial assistance from Redevelopment Access to Capital Program or the Brownsfields Redevelopment Fund.

Carry Over Provision: The tax credit can be carried over for 5 years.

Recapture Provision: If the taxpayer does not maintain the permanent solution or remedy operation status during his/her term of ownership or tenancy, he/she must pay back the difference between the credit taken and the credit allowed for maintaining the remedy (calculated by multiplying the original credit by the ratio of the number of months the remedy was maintained over the number of month’s useful life of the property.)

Massachusetts Department of Revenue Contact Person: Lillian Rosario (317) 626-3264

### C. OTHER FEATURES

1. Penalties: Increases penalties for failure to notify of oil releases, establishes new penalties for failure to maintain a permanent solution, or remedy operation status, or failure to comply with the terms of AUL.
2. EDAs: Provides targeted liability relief and financial incentives for projects located in “Economically Distressed Areas” (EDA). EDAs include all Economic Target Areas (ETAs), areas that meet the criteria for ETA designation but have not been formally designated and sites of former manufactured gas plants.

- Amends municipal exemption from liability for tax foreclosed contaminated property, by deleting requirements that municipalities divest of the property within five years of the tax taking.
  - Allowing municipalities to enter into an agreement with an “eligible person” to abate back taxes, interest and penalties at contaminated commercial or industrial sites.
3. Technical Corrections: Makes corrections to c.21A, section 19 (Licensed Site Professionals), and c. 21E.
  4. Audits: Requires DEP to conduct targeted audits of all sites with AULs, requires DEP to develop standards to ensure that AULs are prepared and implemented in the same manner as other real estate instruments.
  5. Office of Brownfields Revitalization: Establishes a new “Office of Brownfields Revitalization”, which is charged with coordinating and developing a Massachusetts Brownfields Strategy, assisting with Brownsfields covenants not to sue, and assisting with the Brownfields Redevelopment Fund.
  6. Regulations: Requires participating agencies (DEP, MassDevelopment, Dept. of Revenue, the Attorney General’s Office) to promulgate needed regulations within one year of the effective date of the statute.
  7. Study of Brownfields Trust Fund: Requires the Legislature’s Joint Committee on Natural Resources and Agriculture to conduct a study of the “Brownsfields Trust Fund”, as a vehicle through which PRPs could make contributions to gain protection from future liability.
  8. Other Funding (available for expenditure until 6/20/01):
    - DEP: \$10 million for conducting targeted audits of all sites with AULs, increased oversight and training of LSPs, training for DEP staff, and increased inspection and enforcement of AULs.
    - A.G.’s Office: \$2 million for implementation of the Brownsfields Covenant Not to Sue Program.

For More Information:

Massachusetts Department of Environmental Protection

Sarah Weinstein, Acting Deputy Assistant Commissioner, Bureau of Waste Site Cleanup – (617) 292-5820

Barbara Kessner Landau, Brownsfields Coordinator – (617) 556-1193

Margaret Stolfa, Acting Deputy General Counsel – (617) 292-5922

Massachusetts Department of Economic Development

Todd Fernandez, General Counsel – (617) 727-8380

Note: This summary highlights the major features of the Brownsfields Act. For the full obligations and benefits, please review the full text of the Act. This summary should not substitute for your own review and legal interpretation of the Act.

# CAN SPAM Rules

The Federal Trade Commission ("FTC") has issued its final rules defining the criteria for determining the "primary purpose" of an electronic mail message under the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("Act"). The new rules help guide senders on which electronic mail messages are commercial and therefore subject to the Act's requirements. The new rules are very similar to those originally issued by the FTC in 2004, with only some minor changes made in the final version. The rules become effective on March 28, 2005. Click [here](#) to view the new rules.

The rules and their accompanying commentary contain some important developments for both REALTOR® associations and real estate professionals. First, the rules provide fairly specific criteria on which e-mails will be considered commercial and so subject to the rules, including a "net impression" standard for mixed message e-mails containing both commercial and noncommercial content. The FTC declined to give specific guidance on how the new rules impact nonprofit associations or create an exemption for such groups, other than to note in its commentary that it is "possible- even likely" that messages from associations to their members will qualify as transactional or relationship messages. The FTC also has declined at this time to clarify the transactional or relationship message definition and how this definition applies to a broader range of transactions, such as a real estate brokerage transaction. Finally, the commentary accompanying the rules provides helpful guidance on e-mail newsletters and delineates when these newsletters will be considered commercial electronic mail messages subject to the rules.

## *I. Background*

Congress created the Act to give recipients the ability to limit the number of unsolicited commercial electronic mail messages (otherwise known as "spam") they receive. The Act does not prohibit the sending of these messages, unless the recipient has "opted out" of receiving future electronic mail messages from the sender. Rather, the Act imposes certain requirements on senders who send commercial electronic mail messages.

The Act only covers "commercial electronic mail messages", defined as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service". For real estate professionals and REALTOR® associations, the relevant provisions of the Act require that all commercial electronic mail messages contain the following: (1) a legitimate return e-mail and physical postal address; (2) a clear and conspicuous notice of the recipient's opportunity to "opt-out," or decline to receive any future messages; (3) opt out mechanism active for at least 30 days after message transmission; and (4) clear and conspicuous notice that the message is an advertisement or solicitation. Click [here](#) to read a complete summary of the Act's requirements and click [here](#) to read about the rules covering "mobile commercial service messages", an outgrowth of the Act.

The Act does not apply to purely informational messages, such as a newsletter without advertisements or a message related to association governance. The Act also does not cover "transactional or relationship messages", which are defined in terms of an ongoing transaction between a business and a customer involving an identifiable good. For an association, an example of a transactional or relationship message would be an e-mail related to a product or service the member has purchased from the association or a dues billing statement. For a real estate professional, a transactional or relationship message would be an e-mail to a client addressing an ongoing transaction or related to the real estate professional's representation of the client.

One problem with the Act's transactional or relationship message definition is that it isn't entirely clear how this definition applies to transactions not involving the sale of an identifiable good, such as the providing of real estate brokerage services or association membership services. NAR and other groups sought clarification from the FTC on this point, but unfortunately the FTC has not clarified the definition in the Rules and its accompanying commentary. While the FTC has suggested it will revisit this issue at a later date, there is no timetable as to when this will occur.

## *B. Primary Purpose Rules*

Congress directed the FTC in the Act to create "regulations...defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." Over the course of 2004, the FTC conducted a rulemaking on the criteria which should be employed in determining the "primary purpose" of an electronic mail message. The FTC has now issued its final rules ("Rules"), which become effective on March 28, 2005.

The Rules define the "primary purpose" of the message as commercial in the following instances:

1) The e-mail is exclusively an advertisement for a commercial product or service. So, an e-mail message devoted entirely to promoting a product offered by an association for sale or an e-mail from a real estate professional only marketing his or her services to a prospective client would need to comply with the Rules.

2) For messages containing advertisements and a permissible transaction or relationship message, the message is commercial if either (a) a reasonable interpretation of the subject line would lead to the conclusion that the message is commercial, or (b) a permissible "transaction or relationship message" does not appear, "in whole or substantial part", at the beginning of the message's body text.

Under these criteria, so long as the subject line of the message does not suggest a commercial message, the message will not be considered commercial when a majority of a transactional or relationship message appears at the beginning of the message's body text. The entire transaction or relationship message does not have to appear before any commercial content within the message. However, based on the FTC's comments, the closer the entire transactional or relationship message appears to the top of the message, the more likely the message will be considered a transactional or relationship message.

3) For mixed message e-mails with both commercial and noncommercial content, the message will be considered commercial when either (a) a reasonable interpretation of the subject line would lead to the conclusion that the message is commercial or (b) a reasonable interpretation of the body text of the message would lead to the conclusion that the primary purpose of the message is to advertise or promote a commercial product or service. The Rules set forth a set of factors to be used in making this determination, which are: placing the advertisement "in whole or substantial part" at the beginning of the message; commercial percentage of message; and other techniques used to highlight the advertisements such as color, graphics, type size, and style.

In its comments, the FTC refers to its mixed message criteria as the "net impression" standard, where the e-mail is examined in its entirety to determine if it is commercial or not. All of the factors listed above are used in this examination to determine the primary purpose of the message. Use of sidebars, graphics, and other methods of setting part the advertisements within the e-mail are all factors that a sender needs to consider when deciding on whether the Rules apply to its e-mail. The FTC also stated in its comments that the identity of sender could also be part of "net impression" standard, which is helpful to an association who sends an occasional commercial message but sends its members other permissible transactional or relationship messages which they expect to receive from the association.

The Rules also define when the primary purpose of a message is a transactional or relationship message. If a message is devoted exclusively to transactional or relationship message content, then the primary purpose of the message is a transactional or relationship message and so not subject to the Rules. Otherwise, a sender who has commercial content as well as a transactional or relationship message will need to refer to the primary purpose test above to determine if the message is a commercial electronic mail message.

## *III. Other Comments from the FTC*

The FTC has made some other notable comments in its publication of the Rules. First, the FTC addressed comments from associations like NAR who sought an exemption from the Rules for messages associations send to their members or, alternatively, seeking an interpretation from the FTC that these messages constituted a transactional or relationship message. The FTC declined to adopt such an

exemption or provide explicit clarification on whether such messages constituted a transactional or relationship message. The FTC stated that it saw no reason that association members should forfeit the protections of the Act simply by membership in and association and also that it is "possible- or even likely- that messages between a nonprofit and its members could constitute "transactional or relationship messages".

The FTC also commented on how the Rules impact newsletters delivered via e-mail. The FTC stated that the first step in the analysis is whether the newsletter is sent pursuant to a subscription. If the e-mail newsletter is sent pursuant to a subscription, then it is considered a transactional or relationship message and so is not subject to the Rules, so long as the newsletter is not something different than the recipient agreed to receive from the sender. While an exhaustive list of newsletter content does not need to be provided to the recipient prior to sending, the recipient should have some idea on what he or she is going to receive from the sender and advertisements in the newsletter should not overwhelm the other content.

Based on the above, associations who send e-mail newsletters containing both commercial content and noncommercial content should try to have these messages treated as a transactional or relationship message under the Rules by making the newsletter available only to subscribers, who will be the association's members. This could be achieved by identifying the e-mail newsletter subscription as a product or service supported by the members' dues on billing statements and in other places where information about the benefits of association membership are identified. It is important to note that even if the message qualifies as a transactional or relationship message, it will still need to contain noncommercial content and not simply be a vehicle to deliver advertisements to the recipients.

When the newsletter is not delivered pursuant to a subscription, the FTC stated that primary purpose test described in the Rules for mixed message e-mails is used to evaluate e-mail. Since most newsletters sent by real estate professionals will not be sent pursuant to a subscription, the "net impression" standard will be used to determine whether or not these newsletters are subject to the Act's requirements.

#### *IV. Conclusion*

The FTC has issued rules which are intended to help guide senders of electronic mail messages containing commercial content on whether the message needs to comply the Act or not. The Rules set forth three categories of messages containing commercial content and state when a message in each of those categories will qualify as a commercial e-mail. For real estate professionals and associations, they will each need to look at the types of electronic mail messages they are sending out to determine what impact the Rules have on their electronic mail messages

## **COMMUNITY PRESERVATION ACT Q & A**

On September 14, 2000, Governor Paul Cellucci signed into law An Act Relative to Community Preservation (CPA). This new law is intended to offer Massachusetts cities and towns the opportunity to consider adopting a community preservation plan that will address the issues of open space and historic preservation as well as affordable housing. The Massachusetts Association of REALTORS® is supportive of the state's decision to offer this option to communities in the Commonwealth. If adopted, the CPA would be paid for by a combination of property tax surcharges at the local level and state matching funds. A surcharge of up to 3% would be allowed. For example, if your town adopted the 3% surcharge and your annual property taxes were originally \$1,000 then, after adoption of the CPA, your property tax bill would increase by \$30 to a new total of \$1,030. The additional \$30 would be used, in conjunction with state matching money, to fund the CPA in your town. Below are some frequently asked questions about this new law.

- Q. How does a city or town adopt the Community Preservation Act?
- A. The local legislative body (either town meeting or selectman) may approve the question regarding a surcharge for the CPA to appear on local ballot. The decision to adopt the CPA must be approved by majority of voting residents. Signatures of 5% of registered voters requesting its appearance can also put it on the ballot if the legislative body does not. The maximum surcharge that can be approved is 3% and all property exemptions currently in existence under chapter 59 also still apply. No city or town is required to adopt the CPA.
- Q. Does the state provide matching funds?
- A. Yes. The state will collect money for matching funds through a surcharge of \$20 per instrument on most documents filed at the Registry of Deeds. Excepted from the \$20 surcharge are declarations of homestead, photo static copies and marginal references. In addition, municipal lien certificates will only be subject to a \$10 surcharge. State matching funds will be distributed as follows: 80% is given to equally to each CPA town through a matching fund of 5% to 100% depending upon the amount in the state fund and the amount raised by the town. For example, if all the CPA cities and towns raised \$100m total in their individual surcharge funds and 80% of the money raised from the recording fee charged by the state totaled 50 million, then each town would get 50 cents from the state for every dollar they brought in that year as a match from the commonwealth.
- Q. If the state gives out the first 80% of the matching funds equally, how do they distribute the remaining 20%?
- A. The remaining 20 percent that the state has collected is distributed in what is called a second round equity distribution. This involves a calculation that assigns a rank to cities and towns based upon their property valuation per capita and population. It is somewhat complicated but is clearly intended to help out less affluent communities so that they get a bigger piece of the remaining twenty percent.
- Q. Does the CPA create a transfer tax?
- A. NO. There is no transfer tax component in the CPA.
- Q. Is the city or town required to spend the money in a certain way?
- A. The law only requires specific allocation of the 30% of the funds: 10% each for affordable housing, open space, and historic properties. No more than 5% can be used for administration thus leaving remaining 65-70% for communities to allocate amongst the three interests listed above in accordance with their community preservation committee.
- Q. Should all cities and towns adopt the CPA?
- A. That is up to the local legislative body and the citizens of each community to decide. Communities that believe they are adequately addressing the issues of open space, affordable housing, and historic preservation may decide the CPA is not something they need. In addition, communities (and voters) who do not wish to have a surcharge on their property taxes for these causes may decide not to support the CPA. It is important for residents – and especially REALTORS® - to evaluate what they believe to be the important issues in their city or town and decide if this new law is something that will be beneficial.

# DEEDS

Overview: A deed is the document which acts to pass title of real property from the seller (grantor) to the buyer (grantee). A deed transfers an interest in property from one party to another party. The different types of deeds offer varying levels of protection (warranties) against defects in the ownership of the property. Liens against the property for unpaid taxes or for judgment creditors, adverse possessors, easements, and use restrictions are some of the things that deed warranties may protect against.

Relevant Law: M.G.L. Chapter 183

Important Issues:

Types of Deeds: There are three types of deeds which may be conveyed to the purchaser of property. Each deed type contains different amounts of warranties protecting the grantee-purchaser from possible defects in title that may disrupt the possession and/or ownership of the sale property. The three types of deeds used in Massachusetts are the warranty, quitclaim, and fiduciary deeds.

- *Warranty Deed* – This type of deed provides the greatest protection from potential defects in title. The grantor-seller of a warranty deed conveys the strongest type of ownership, fee simple, to the grantee-buyer and guarantees that title is free of *all* defects, except those specifically mentioned in the deed. In a warranty deed, the grantor-seller promises to defend against all claims against the grantee-buyer which arise as a result of a defect in title arising *prior to and during* the grantor-seller's ownership of the property.
- *Quitclaim Deed* – The grantor of a quitclaim deed warrants title against defects arising during the grantor's association with the land but not against defects arising before that time. Simply stating, the seller conveys to the buyer whatever title he/she held and warrants that he/she has not made any encumbrances on the land other than those specifically mentioned in the deed. This deed is commonly used in Massachusetts.
- *Fiduciary or Release Deed* – This type of deed contains the least amount of protection for the purchase. The grantor warrants nothing and merely transfers what title, if any, the grantor-seller has. Fiduciary deeds are appropriate and common where the seller is acting in a fiduciary capacity (e.g. – an executor, trustee, or guardian).

Information to be contained in a deed:

- Grantor (Seller) and Grantee (Buyer) must be identified in the deed (contain addresses and the capacity in which a party acts). If there is more than one grantee, the deed should specify the type of co-ownership);
- A recital of the amount of consideration (monetary or otherwise);
- Words of conveyance (use of the words “grant”, “convey”, and “release” are common followed by the type of covenants contained in the deed (e.g. – “I hereby grant with quitclaim covenants...”);
- Description of the property;
- Title reference (cite the book, page and registry where the title is registered);
- An account of any easement, restrictions, or other encumbrances (the phrase “subject to easements and restrictions of record insofar as now in force and applicable” is often used);

A deed failing to comply with all of the required is not necessarily invalid. Instead, a non-conforming deed may not properly be recorded with the Registry of Deeds. Consult legal counsel to ensure compliance with all content and recording requirements.

Frequently Asked Question:

Q: What is the best way for buyers to protect themselves from unknown title defects that potentially may be discovered subsequent to the sale transaction?

A: Although warranty and quitclaim deeds provide certain warranties protecting against title defects, there are other precautions that may be taken by buyers to protect themselves. Title insurance is a very common way to protect a buyer's investment. Because of its high level of protection, most lenders will require that the borrowing buyer take out a title insurance policy. A title insurance policy protects against possible defects in title. A title examination and title insurance policy are two of the best ways to ensure that the property has clear, marketable title.

Q: At what point in a sale transaction does title pass from the seller to the buyer?

A: As stated above, a deed passes title of property from one party to another. Possession of the deed by the grantee-buyer creates a rebuttable presumption that title to the property belongs with the grantee-buyer. However, even if the grantee-buyer does not have actual possession of the deed, courts will look at the intent of both the grantor-seller and grantee-buyer to determine who holds title. If the parties intend that title pass immediately, then title so passes even though the deed has not physically passed to the grantee nor has the grantor relinquished possession of the property.

For more information please contact the following:

Massachusetts Association of REALTORS® at (800) 370-LEGAL

This publication is provided as a service to members of the Massachusetts Association of REALTORS® and is intended for educational use only. The Massachusetts Association of REALTORS® does not accept responsibility for any misinterpretation or misapplication by the reader of the information contained in this article. The publishing of this material does not constitute for practice of law nor does it attempt to provide legal advice concerning any specific factual situation. FOR ADVISE ON SPECIFIC LEGAL PROBLEMS CONSULT LEGAL COUNSEL.

Opinion or suggestions in this publication do not necessarily represent the official policies or positions of the Massachusetts Association of REALTORS®.

© 1998 The Massachusetts Association of REALTORS®

## EMFs

Electric magnetic fields are found around all electric household appliances and powerlines, and have become a concern to consumers. Magnetic fields are of greater concern because they are not easily contained, and because they readily penetrate materials and people. The strength of magnetic fields is measured in milliGauss (mG). It varies in intensity, depending on distance.

### *Health Implications*

Studies have suggested, but not conclusively proven, a correlation between exposure of EMF and a higher-than-normal incidence of leukemia and cancers of the breast, prostate, and brain. These studies point to health hazards among children who live close to power lines and among people who are exposed to high levels of EMFs at their job. At this time, there is no firm verdict about EMFs. For every scientist who believes that EMFs cause health problems, another disagrees.

### *Recommendation*

Some state regulatory agencies have adopted regulations that limit the allowable intensity of electronic fields within the right-of-way of new high voltage transmission lines, and sets limits on magnetic fields. There are also several EMF bills pending in some state legislatures. If buyers ask about EMF's direct them to utility companies, government agencies, and printed materials for more information. Concerned buyers may contact people who have actually conducted research about EMF's, then draw their own conclusion.

## CFCs

### Environmental Implications

The use of CFCs is being curtailed, because CFC molecules drift into the upper atmosphere and destroy the stratospheric ozone (O<sub>3</sub>) molecules that absorb and reflect harmful ultraviolet radiation. The 1990 Clean Air Act (CAA) amendments require a complete phase-out of CFC consumption and production by the year 2030. These amendments also give the EPA authority to establish CFC recycling requirements and emissions standards.

Handling CFCs - It is the responsibility of the person servicing, maintaining, or repairing an air-conditioning unit or other CFC-containing appliance (i.e., a refrigerator) to prevent the release of CFCs into the air.

## PCBS

Biphenyls are complex liquids used to heat transfer agents (i.e. to remove heat from the source generating it.) These compounds are manufactured, rather than naturally occurring. Polychlorinated biphenyls (PCBs) are biphenyls in which many hydrogen atoms have been replaced by chlorine atoms. Once biphenyls are chlorinated, the resulting PCBs are toxic, and have a long life span.

PCBs are:

Used as insulation for electrical products, such as cables, wiring, transformers and fluorescent light fixtures and found in high-pressure, high-heat liquids used in train braking and other hydraulic systems

In vehicle fluids such as hydraulic fluids, PCBs can be a problem when equipment has been sitting for an extended period of time. This might occur in rural areas where farm equipment may have been abandoned. The Toxic Substance Control Act of 1976 (TSCA) banned the use of PCBs in electrical transformers. PCB-containing transformers, commonly called "wet" transformers, are not dangerous to the environment unless they leak, burn or explode. It is impossible to tell whether a transformer is wet just by looking at it. Utility companies have recycled older transformers and converted them to "dry" (non-PCB-containing) ones. Therefore, a transformer's age does not always indicate its contents. The presence or absence of PCBs can be verified only through testing. *Warning Signs - A leaking transformer is always a potential problem, especially if its PCB status is unknown. In addition to evidence of leakage, other indications of problems include unexpectedly high electric bills, burned or blackened areas on the transformer itself, or arcing or electrical sparking at the panels or transformer.*

Action - Any one of these conditions calls for immediate action. Repairs should be made quickly. NOTE: If the transformer is owned by a utility company, the first step is to notify the company.

## HANDLING ESCROW DEPOSITS

*Q. Who has the "right" to hold the deposit money at the signing of a Purchase and Sale Agreement?*

A. The seller is the only person with a "legal right" to hold this money. Provisions usually are made in the Purchase and Sale Agreement for the broker to hold this money until the passing of papers. The broker must hold funds in escrow separate from all other funds and not co-mingled with his own.

*Q. What is escrow?*

A. "Escrow" is the deposit of money or documents with a person other than a party to the transaction. The money or documents are to be delivered to the party entitled thereto upon the happening of a certain event (passing of papers). The subject matter of the transaction is the "escrow." The terms upon which the escrow is deposited constitutes the "escrow agreement", and the person holding the escrow is the "escrow agent."

*Q. O.K., I'm a real estate broker, and I deposit the money in escrow. Does the money have to be deposited in an interest bearing account?*

A. Only if requested by the parties who will receive the interest earned on the deposit.

*Q. Who is entitled to the interest earned on money deposited in an interest bearing account?*

A. The person so designated in the Purchase and Sale Agreement. It could be the seller, buyer, or broker.

\* The seller(s) may want to be compensated for taking their house off the market.

\* The buyer(s) may want the interest as compensation for placing a large deposit on the property. (A seller may agree to this request knowing that the large deposit is in the seller's best interest.)

\* The broker may want to be compensated for processing the necessary paperwork which has become more involved since the Internal Revenue Service has adopted new regulations.

*Q. Who should receive the deposit money if the property fails to close?*

A. The Board of Registration of Real Estate Brokers and Salesmen issued the following Regulations which became effective on May 1, 1987:

### RESOLUTION OF DEPOSIT DISPUTES

a) The following procedure shall govern the resolution of deposit disputes between sellers and prospective purchasers of real property in the Commonwealth of Massachusetts, notwithstanding any agreement between the parties to the contrary.

b) Where a dispute arises between a seller and prospective purchaser over entitlement to a deposit made for the purchase of real property the broker of record must, within a reasonable time, make a good faith determination as to the rightful party and return such deposit.

c) A reasonable time for return of a deposit to the rightful party shall not exceed 14 days from the date upon which the broker acquired knowledge of the dispute; provided however, that the agreement in the transaction clearly indicates the rightful party to the deposit.

d) Where the agreement does not clearly indicate the rightful party to whom the deposit belongs the broker of record must follow the procedure as herein provided.

1. Seek resolution by the seller and prospective purchaser within 21 days from the date upon which the broker acquired or should have acquired knowledge of the dispute; or,

2. Where the seller and prospective purchaser fail to resolve their deposit dispute within the aforementioned 21 days the broker shall file an action for interpleader within 30 days after expiration of the above mentioned 21 days.

## EVICCTIONS

Overview: Regardless of whether a tenant has a lease or not, landlords may not legally evict a tenant without a court order. Any landlord who attempts to regain possession of a premises by force without the benefit of judicial process is liable for damages equal to the damages incurred by the tenant or three month's rent, whichever is greater. Massachusetts has established an extensive procedure required for legal evictions.

Relevant Law: M.G.L. Chapter 186, § 14  
M.G.L. Chapter 184, § 18  
Uniform Summary Process Rules for Evictions in Housing, District and Superior Courts.

Important Issues Removal of a tenant from possession of a premises involves three major steps: (1) providing notice to the tenant; (2) obtaining judicial permission to evict the tenant; and (3) executing the eviction of the tenant.

*Notice to Quit* – A landlord wishing to evict a tenant must provide the tenant with proper notice of his/her intent to terminate the tenancy. This notice, referred to as a “Notice to Quit” must be delivered to the tenant by a method which ensures that the tenant actually receive the notice. The amount of notice required depends on whether there is a written lease or not and the reason leading to the commencement of the eviction proceeding. If the eviction is based on failure to pay rent, the landlord is required to provide the tenant with a 14-day notice to quit regardless of whether there is a written lease or not. For any other reason and if no written lease, the landlord must provide 30-day notice to the tenant. However, if there is a written lease, the notice requirement will vary depending on the terms contained in the lease. This notice is a prerequisite to commencement of an eviction action in court.

*Summary Process Proceedings* – Following the issuance of proper notice and expiration of the notice period without the tenant vacating, the landlord may now formally file a summons and complaint in order to initiate a judicial proceeding to determine whether the tenant may be properly evicted. As with the notice to quit, the summons must be adequately delivered to the tenant to ensure its validity. Check with legal counsel to ensure proper delivery. Contained in the summons and complaint is the date by which the landlord must formally file the complaint with the court and prove its delivery to the tenant. This date, called the entry date, must occur at least 7 days, but not more than 30 days, after the date that the summons was served. The tenant is then required to “answer” the complaint (state any defenses to the complaint) within 7 days of the entry date. Failure to hand deliver the answer to the court within the requisite period may result in the default judgment in favor of the landlord.

Also contained in the summons is the trial date for the summary process hearing. Postponement of the trial date is possible in certain circumstances. Failure to attend court on the designated trial date will likely result in a default judgment in favor of the landlord if the tenants fail to appear or a dismissal of the eviction proceeding if the landlord fails to appear. While reconsideration of the case may be possible, it is advisable to attend the scheduled proceeding whereas failure to do so will result in prolonging the eviction process and increasing the costs of all parties involved. Limited appeals of the court's decision are available to both parties. Consult your legal counsel.

*Execution of eviction* – If the court rules in favor of the landlord, the tenant will receive from the court a notice referred to as an “Execution”. The execution allows the landlord to remove the tenant from the premises. However, the tenant is allowed 10 days from the issuance of the court decision to vacate the premises. An execution is only issued after the expiration of the 10 days from the tenant's failure to vacate. Stays of executions are available to those tenants who receive permission from the court to delay their eviction. This postponement is usually limited to extreme situations such as for tenants who are handicapped or over 60 years of age.

As with any legal proceeding, legal evictions involve potentially great costs and time to all parties involved. Whenever possible, it is advisable that the landlord and tenant attempt to negotiate a satisfactory settlement therefore drastically limiting the time, effort and resources involved.

Due to extensive details involved in an eviction process, it is crucial for all parties involved to adhere to procedural deadlines and requirements. Consult legal counsel to ensure that you are following proper procedure.

#### Frequently Asked Questions:

Q: Is it possible for a tenant to stop an eviction proceeding by paying all back rent due to their landlord?

A: It depends. If there is a valid written lease, the tenant may pay back all rent to the landlord and the eviction action may be stopped if the landlord agrees to dismiss the complaint. If the tenant pay the back rent after the summons and complaint has already been delivered, the tenant must reimburse the landlord the costs of filing the eviction complaint. If there is no lease, the eviction process may be terminated and the tenancy revived upon payment, within 10 days after receiving the notice to quit, of all back rent due to the landlord. However, a tenant with no lease may not revive their tenancy if they have received in the previous 12 months, a notice to quit for failure to pay rent.

Q: Does a landlord always have to provide Notice to Quit prior to initiating a summary process proceeding against a tenant?

A: No. A notice to quit is not required if a tenant's lease expires or their tenancy period expires (if no lease), and the tenant remains in possession of the premises. Beginning the day after the tenant wrongfully retains possession of the premises, therefore becoming a tenant at sufferance, the landlord may initiate an eviction proceeding without providing the tenant a notice to quit.

Q: Does the eviction process differ when the tenant resides in public housing?

A: Yes. Landlords of public housing are usually required to appear before the local housing authority prior to bringing a summary process proceeding in court.

Q: How long does it typically take for a tenant to be legally evicted?

A: While the designated process usually takes no less than 60 to 90 days, this time may vary drastically. In certain circumstances continuances may be granted to allow either party time for document discovery or a tenant may obtain a stay of execution for an extended period if the court determines it to be appropriate.

For more information please contact the following:

Massachusetts Association of REALTORS® at (800) 370-LEGAL.

This publication is provided as a service to member of the Massachusetts Association of REALTORS® and is intended for educational use only. The Massachusetts Association of REALTORS® does not accept responsibility for any misinterpretation or misapplication by the reader of the information contained in this article. The publishing of this material does not constitute the practice of law nor does it attempt to provide legal advice concerning any specific factual situation. FOR ADVICE ON SPECIFIC LEGAL PROBLEMS CONSULT LEGAL COUNSEL.

Opinion or suggestions in this publication do not necessarily represent the official policies or positions of the Massachusetts Association of REALTORS®.

© 1998 The Massachusetts Association of REALTORS®

## GIFTS

Overview: The lifeline of any successful real estate office is obtaining new listings and new clients. As a result, brokers are constantly trying different business practices in hopes of increasing both listing and clients. These often creative practices usually take the form of advertising and incentives. However, state law, regulation, and the NAR Code of Ethics place numerous requirements and limitations on the use of advertising and incentives.

Relevant Law: M.G.L. Chapter 112, §§ 87 PP and 87 RR  
REALTORS® Code of Ethics and Arbitration Manual, Article 12-3

Important Issues: Although not per se unethical, the offering of premiums, prizes, merchandise discounts or other inducements to list, sell, purchase or lease are subject to limitations and restrictions of state law and the ethical obligations established by any applicable Standard of Practice. REALTORS® should exercise care and candor in all promotions. Article 12-3 of the National Association of REALTORS® Code of Ethics states that the offering of prizes or merchandise discounts is not unethical even though it requires a person to list or purchase a home through a REALTOR®. This Article does require that all advertisements clearly state what the customer must do in order to receive the gift (e.g. Must he/she buy a home that is one of the REALTORS® listings? Must he/she purchase a home when you are acting as a co-broker on another firm's listing?)

Massachusetts General Law chapter 112, § 87RR prohibits an unlicensed person from acting as a real estate broker or salesperson. M.G.L. chapter 112, § 87PP defines a real estate broker as a person who "assists or directs in the procuring of prospects...in the expectation or upon the promise of receiving or collecting a fee, commission or valuable consideration." Therefore, a former client or unlicensed third party who assists a broker in the procuring of prospects by referring customers, with the expectation of receiving some type of valuable consideration (e.g. – gift certificate), would be in violation of M.G.L. chapter 112, § 87RR.

### Frequently Asked Questions:

Q: May a broker offer non-monetary incentives such as gift certificates or vouchers to a former client or other third party who refers customers to the broker?

A: No. M.G.L. chapter 112, § 87RR prohibits an unlicensed broker or salesperson from receiving any "valuable consideration" for assisting in the procuring of prospects. "Valuable consideration" includes gift certificates and other gifts and is not limited to cash incentives. However, if the third party is licensed broker or salesperson they may receive such gifts.

For more information please contact the following:

Massachusetts Association of REALTORS® at (800) 370-LEGAL.

This publication is provided as a service to members of the Massachusetts Association of REALTORS® and is intended for educational use only. The Massachusetts Association of REALTORS® does not accept responsibility for any misinterpretation or misapplication by the reader of the information contained in this article. The publishing of this material does not constitute the practice of law nor does it attempt to provide legal advice concerning any specific factual situation. FOR ADVICE ON SPECIFIC LEGAL PROBLEMS CONSULT LEGAL COUNSEL.

Opinion or suggestions in this publication do not necessarily represent the official policies or positions of the Massachusetts Association of REALTORS®.

© 1998 The Massachusetts Association of REALTORS®

## INDEPENDENT CONTRACTOR STATUS

Independent contractor salespeople can be assured they will not be treated as employees for federal tax purposes if they satisfy the three requirements established in the Tax Equity and Fiscal Responsibility Act of 1982. Conversely, salespeople failing to satisfy these three requirements must rely on the "Safe Harbor" provisions of the Revenue Act of 1978 and thus cannot be assured that they will not be treated as employees and their brokers treated as employers in the event of an IRS audit. The three requirements, all of which must be met, are:

1. The salesperson must be a licensed real estate agent.
2. Substantially all of the salesperson's remuneration (whether or not paid in cash) for the services performed as a real estate agent must be directly related to sales or other output rather than to the number of hours worked.
3. A written agreement must exist between the salesperson and the person for whom he works, which agreement must provide that the salesperson will not be treated as an employee with respect to such services for federal tax purposes.

The licensure requirement should be easily satisfied by all real estate salespeople in view of the license requirements in all states, territories, and the District of Columbia. Similarly, independent contractor salespeople have historically been paid on a commission only basis and not paid an hourly wage, thereby enabling most salespeople to satisfy the second requirement without the need to modify their present contract. Salespersons compensated based on the number of hours worked will not qualify under the new, simplified test unless that salesperson also is compensated based on sales, with the latter form constituting "substantially all" of his compensation. Unfortunately, at this time there are no guidelines as to what constitutes "substantially all" of his compensation. Brokers therefore would be wise to avoid all hourly compensation paid to all salespeople that is based on the number of hours worked.

Immediate and careful consideration needs to be given to the third requirement for a written agreement. Such agreement must specify that for federal tax purposes the salesperson will not be treated as an employee with respect to the services he performs as a sales agent. The National Association of REALTORS® has long recommended that brokers enter into written agreements with their independent contractor salespeople. Effective 1/1/83, such written agreements will be mandatory in order for salespeople to meet the statutory definition. Not only must the broker and salesperson be parties to a written agreement, the agreement must state "that the salesperson will not be treated as an employee with respect to the services performed by such salesperson as a real estate agent for federal tax purposes."

All brokers and salespeople are strongly advised to review their existing written agreements to determine whether a provision substantially identical to the forgoing statement is present. In the event such a provision does not exist in the current contractual arrangement, such language should be added immediately, and in no event later than 1/1/83 if the broker and salesperson wish to avail themselves of the newly statutory definition.

**It is important to note that the three part statutory test has clarified the independent contractor/employee issue for federal tax purposes only. The statute does not control whether a salesperson is an employee or an independent contractor under the various state laws governing worker's compensation, unemployment compensation or state income taxation. These determinations continue to be governed by state statute or judicial decision. As a consequence, while control is no longer a factor in determining whether a salesperson is an employee or an independent contractor for federal tax purposes, it may, depending upon state law, continue to be the measure of independent contractor status for state law purposes. While the exercise of control by a broker over his salespeople by, for example, requiring attendance at sales meetings, assigning floor time, or specifying a minimum number of hours salespeople must work each week, will no longer jeopardize the independent contractor status of such salespeople for federal tax purposes, such exercise of control could in many instances render such salespeople "employees" within the meaning of state worker's compensation, unemployment compensation and state income tax laws.**

Thus, brokers and salespeople should consult with their tax counsel prior to initiating any changes to their existing relationships or written agreements other than those necessary to satisfy the new definition. This information was prepared by the Legal Affairs Division of the National Association of REALTORS® (312/329-8371).

## 7 Items Every Independent Contractor Agreement Should Have

1. A statement that the salesperson's compensation will be solely in the form of commissions
2. A place where the salesperson can acknowledge licensure and agree to be responsible for all licensing fees and requirements, such as continuing education.
3. A statement that all documents and correspondence relating to transactions or prospects remains the property of the brokerage company
4. A description of what expenses—insurance, association dues, Internet connection—each of the parties will pay
5. A statement that the salesperson is not an employee
6. A description of how the agreement can be terminated and what the responsibilities of each party are at that time
7. A statement that the salesperson will conduct business in accordance with the state's license law and regulations

**TIP:** Many state and local associations of REALTORS® have created model independent contractor agreements that you can customize to meet your needs.

**TIP:** Sales associates can sign an affidavit each year restating their responsibilities for paying such expenses as mileage and car expenses, client entertainment costs, and all self-employment taxes

## **INDOOR AIR QUALITY (IAQ)**

Poor indoor air quality (IAQ) is a relatively new problem in residential properties. Good IAQ makes a home a healthy place in which to live, and it improves the quality of life. You may be familiar with the issue of indoor air quality because of the much-publicized occurrences of sick building syndrome in commercial properties – especially office buildings.

Poor indoor air quality can be caused by:

- The quality of the “ambient” (i.e. fresh) air being circulated in the home – radon may enter a home and have no where else to exit
- The condition or capacity of the heating, ventilation, and air conditioning system (HVAC), i.e.,
- Ventilation may be insufficient
- Mold, mildew, viruses, etc., may grow in a duct that needs cleaning
- Carbon monoxide may be produced by improperly vented kerosene or gas heaters
- Seepage or moisture at ground level of the house result in a greater presence of mold and mildew

This issue predominantly arises from the condition of a home and its features, and can only be addressed by an HVAC expert.

### *Health Implications*

It is not possible to categorize or pinpoint a specific health hazard caused by poor IAQ; it is solely dependent on the issue at hand.

### *Testing*

To determine air quality problems, the scope of testing procedures is vast. Indoor air problems generally require air monitoring and in-depth evaluations of ventilation systems. It is wise to test only for suspected problems – random testing can be very expensive.

### *Remediation*

An insufficient ventilation system and the presence of radon are bigger issues. Many IAQ problems can be taken care of by increasing ventilation.

A quality ventilation system/air exchanger will provide a healthier living environment by decreasing the chance for spores, molds, formaldehyde, and radon to occur in the air. It will also help keep utility bills to a minimum by maintaining household temperatures. However to reap the benefits of a ventilation system, a home needs to be extremely well insulated. The cost of insulation can greatly add to the cost of installing a ventilation system.

## **LAND USE INITIATIVE**

*ARE YOU FACING A PROPOSED ZONING ORDINANCE THAT COULD NEGATIVELY IMPACT YOUR MEMBERS' BUSINESS?*

*DID YOUR LOCAL GOVERNMENT RECENTLY PROPOSE AFFORDABLE HOUSING REQUIREMENTS THAT COULD POSE A CHALLENGE FOR REALTORS® IN YOUR AREA?*

*ARE YOU TRYING TO PROVIDE MEANINGFUL INPUT TO YOUR LOCAL OR STATE GOVERNMENT ON A NEW GROWTH MANAGEMENT PROPOSAL?*

If you answered "yes" to any of these questions, NAR's Land-Use Initiative could be just the assistance you're looking for. I encourage you to give it a try. It won't cost you a dime--just a few minutes of your time. Yes, this service is free to you.

NAR's Land-Use Initiative offers our states and boards timely and reliable technical analyses of proposed land-use and development controls in your area. It's not enough anymore to simply react to laws and regulations after they're passed. Our job as a professional association is to play an active and persuasive role in land-use discussions that affect our communities and our member's customers.

We've engaged the services of Robinson & Cole, a nationally known land use and real estate development law firm, to provide quick, comprehensive analysis of land-use proposals in your area. The analysis may include: proposed revisions to the regulation or legislation; talking points for a meeting with a city council or key legislator; an assessment of the proposal's legal implications and practical strengths and weaknesses; or advice on strategies to help your association achieve a desirable outcome on the proposal. All you have to do is ask. Funded through NAR Government Affairs, Robinson & Cole will provide you with an analysis of the local land-use proposal you submit, with recommendations on how your association can make a difference in the final plan-- all within 3 to 15 business days. I'm very proud of this project, which is available as a pilot project until May, at which time we will evaluate its success and determine its future.

This is your chance to engage in the land-use debate in your state or community in a timely, constructive manner. I invite you to take action, and the cost of the first step is on us.

NAR's Land-Use Initiative is a new program designed to assist state and local REALTORS® associations in your public policy advocacy of land-use issues. Upon request, NAR will provide expert analysis of the legal, political, economic, environmental and social issues surrounding special legislative and regulatory land-use proposals. The program focuses on proposed rather than existing legislation/regulation. Therefore, NAR will only accept requests from state or local REALTOR® associations. The request must be signed by the Association President, Executive Officer or the Government Affairs Director.

Once we ensure that a request satisfies the established requirements of the program, we will fax it to the vendor we have secured to provide the analysis. Within three (3) business days of NAR's receipt of your proposal, you will receive an initial verbal or e-mail response from the vendor. If requested, you will receive a follow-up written analysis within fifteen (15) business days or earlier if necessary.

# LEAD PAINT

## TITLE X (SECT. 1018) - REAL ESTATE LEAD-BASED PAINT DISCLOSURE REGULATIONS

### SUMMARY OF SECTION 1018 OF TITLE X:

Section 1018 of Title X of the Residential Lead-Based Paint Hazard Reduction Act regulates disclosure of lead-based paint in sales and lease transactions involving properties built before 1978. In cases where a seller or lessor utilizes the services of a real estate agent has the responsibility to inform the seller/lessor of their obligations under the Act and to ensure compliance. The basic requirements of Section 1018 are that:

1. Sellers and lessors of most residential properties built before 1978 must disclose the presence of known lead-based paint and/or lead-based paint hazards;
2. Sellers and lessors must provide purchasers and lessees with copies of any available records pertaining to the presence of lead-based paint and/or lead-based paint hazards;
3. Sellers and lessors must provide purchasers and lessees with a federally approved lead hazard information pamphlet;
4. Sellers must provide purchasers with a period of up to 10 days prior to becoming obligated under the purchase contract during which the purchaser may conduct a risk assessment or inspection for the presence of lead-based paint and/or lead based paint hazards. The purchaser may agree to waive that testing opportunity;
5. Sales and lease contracts must include specified disclosure and acknowledgement language.

#### I. EFFECTIVE DATES:

- A. Owners of more than 4 residential dwellings: Six months after date of publication in the Federal Registration (around Sept. 6, 1996).
- B. Owners of 1 to 4 residential dwellings: Nine months after the date of publication in the Federal Register (around Dec. 6, 1996).

#### II. WHERE TO OBTAIN COPIES OF THE RULE, LEAD PAMPHLETS, DISCLOSURE ACKNOWLEDGEMENT FORM, ETC.

Call the National Lead Information Clearinghouse toll free at (800) 424-LEAD to obtain a free copy of the federal lead-based paint disclosure regulation, a brief explanatory document and one copy of the lead hazard information pamphlet. ("Protect Your Family From Lead in Your Home") that must be distributed under the rule. (Note: Agents can Xerox the pamphlet for use in their transactions. The regulation does not require original copies be distributed.) The information pamphlet is also available on the World Wide Web at <http://www.nsc.org/nsc/ehc.html>.

#### III. COMPLIANCE QUESTIONS WITH TITLE X

##### In what types of transactions do the regulations apply?

The regulations apply to the so-called "target housing", which is residential housing constructed prior to 1978. Certain exceptions apply, as described further below.

##### If these obligations are imposed on sellers and lessors, what obligations do real estate agents have?

The listing agent must advise the seller or lessor of his obligations under the regulations. Any agent involved in the transaction, except "buyer's agents" who are compensated solely by the buyer, must insure that the seller/lessor satisfies his obligations. For practical purposes, in most cases this probably

means that the agent(s) involved in the transaction will be performing the duties required by the regulations.

What must the seller/lessor, or his agent, do during the typical sales or lease transaction?

The seller/lessor or his agent must do the following in compliance:

Distribute a lead hazard information pamphlet developed or approved by EPA: The purchaser/lessee must be provided with a copy of the federal pamphlet "Protect Your Family From Lead in Your Home". States that already distribute disclosure pamphlets (e.g. California) can apply to EPA or HUD for approval to substitute their pamphlet for the federal one.

Give notice of the presence of known lead-based paint or lead-based paint hazard: Sellers/lessors must disclose, based on their actual knowledge, whether the property contains lead-based paint or lead-based paint hazards. The regulations make it clear that as long as the agent has informed the seller/lessor of their obligations to disclose, that the agent will not be held liable for the failure to disclose to a purchaser or lessee the presence of lead-based paint and/or lead-based paint hazards known by a seller or lessor but not disclosed to the agent.

Provide all tests results available to the seller/lessor:

If any prior testing has been done, the seller/lessor must provide to the purchaser/lessee copies of all the testing results and records. For large multi-family properties, the regulations require that even if the unit in question has actually been tested lessors must disclose that lead was found in other units in the building or complex. Lessors must also disclose if any lead has been found in common areas on the property (e.g. hallways, playgrounds, etc.)

Provide purchasers a period of up to 10 days to have the property tested:

The law require that sellers provide potential purchasers ten days to have the property tested for lead before they become obligated under the contract. EPA and HUD anticipate that disclosure and testing for lead paint will operate similar to existing market procedures for home inspection contingencies, where the purchaser can void the transaction if he discovers unacceptable amounts of lead-based paint and the seller refuses to remove it. Purchasers may agree to a shorter time to perform the testing, or may even agree to waive their opportunity to test altogether.

Include the lead warning statement and acknowledgment language as an attachment to the sales or lease contract:

Sales contracts and leases must contain specified warning language on a separate sheet of paper and an acknowledgement that the purchaser/lessee has received all the relevant disclosure information. For purchasers, the sheet must also include a section acknowledging that they were provided a 10-day opportunity to conduct a lead test or that they agreed to a shorter testing period or waived it completely. Agents must also certify in writing that the seller/lessor was advised of his obligations and that they are aware of their duty to insure the seller/lessor's compliance with the disclosure requirements.

In an effort to be flexible, EPA and HUD are not mandating the use of a particular federal form. Sellers, lessors and real estate agents can develop and use their own forms so long as they include the federal warning language and the basic elements listed above. This will allow states that already have disclosure forms in use to merely incorporate the federal language into their own forms and will avoid duplication. The regulations include a standard disclosure form that can be used (see attachment I).

To whom do you have to make the disclosure?

The disclosure must be made to the purchaser or the lessee. The regulations define a "purchaser" as any entity that enters into an agreement to purchase, and "lessee" is defined as any entity that enters in an agreement to lease, rent or sublease. The regulations make it clear that the rule does not require mass disclosure to all prospective purchasers or lessees, regardless of their degree of interest. Only the **actual** purchaser or lessee, must receive the information, subject to the timing requirements for the below.

When should the disclosure occur and the pamphlet be distributed?

For sales transactions the disclosure must occur prior to the seller's acceptance of the purchaser's written offer to purchase. If the potential purchaser makes an offer before the requisite disclosures are provided, the seller **may not** accept that offer until the disclosure activities are completed **and** the potential

purchaser has had an opportunity to review the information and consider whether to amend his offer prior to becoming obligated under the contract.

For lease transactions the lessor must provide the information and complete the disclosure portions of the lease before he accepts the lessee's offer, and likewise must provide the lessee an opportunity to review the disclosed information and the chance to amend his lease offer.

#### How will the 10-day testing period work?

While the regulations do not prescribe any particular, method of satisfying this requirement, what they envision and allow is for the potential purchaser and seller to include the in the sales contract home inspection contingency language similar to that already in common use. The only specific requirement is that the purchaser must be given up to 10-days to have the testing done. The purchaser can demand his opportunity to test even if the seller has already had the property tested. The parties can mutually agree to a longer or shorter time frame.

Typical contingency language will provide the purchaser with the right to cancel the contract if the test results show unacceptable amounts of lead in the home. The contingency language may also provide the seller the right to remove the lead and correct the problem, in which case the purchaser will be bound by the contract. As noted, the purchaser can simply waive the right to test, as long as it is in writing. While there is no mandatory federal contingency language, the regulations include a suggested format. The parties are free to create whatever contingencies concerning the starting and ending time for the testing, each party's responsibilities if lead is found as a result of the test, the disposition of earnest money, and other manners.

#### Which transactions involving pre-1978 properties are exempt from these regulations?

While Title X law applies to all pre-1978 properties, EPA and HUD have exempted certain properties from compliance under the regulations. Specifically exempt are the following types of properties:

**Note:** Under the proposed rule informal rental agreements (e.g. oral leases) were also exempt. They are covered, however, under the final rule.

#### Which agents must comply with the regulations?

The regulations define agent as "any party who enters into a contract with a seller/lessor, including any party who enters into a contract with a representative of the seller or lessor for the purpose of selling or leasing target housing." This means that listing agents, selling agents, and buyer agents (if paid by the seller through a cooperative brokerage agreement with the listing agent) are "agents" and are responsible for answering compliance under the rule.

#### How will the federal regulations affect the need to comply with lead paint disclosure, testing or abatement rules imposed under states or local law?

While EPA and HUD cannot delegate the enforcement and administration of Title X to the states, they have tried to avoid duplication and to allow for three incorporation of the federal requirements into existing state laws. If state law already requires use of a disclosure pamphlet that addresses lead paint, the state may apply to EPA for approval to have the document used in lieu of the federal pamphlet. Compliance with these federal requirements **does not**, however, satisfy or otherwise eliminate any obligations of sellers, lessors or agents to comply with any lead-based paint disclosure, testing or remediation requirements under state or local law.

#### How long will agents have to keep their transaction records?

Three years from "completion date of the sale" (i.e., the closing date) or three years from commencement of the leasing period.

#### How much lead can be found in paint for rental housing to qualify as "lead-based paint free housing"?

Pre-1978 housing that has been found to be free of paint or other surface coatings that are in excess of 1.0 milligrams per square centimeter or 0.5 percent by weight. The only way to tell whether the paint meets these requirements is to have it tested by a state or federally-certified licensed lead testing firm.

#### What are the penalties for non-compliance?

The regulations give the federal agencies the flexibility to issue warnings (without penalties) as appropriate to let people know they are out of compliance and to give them an opportunity come into compliance. However, the federal penalties are severe for non-compliance. Civil penalties can range up to \$10,000 for each violation. In addition, in habitual cases of non-compliance those who knowingly and willfully violate the law can be subject to criminal penalties of \$10,000 for each violation and imprisonment for up to one year, or both. These penalties are in addition to any traditional claims under state law for failure to disclose a material hazardous condition. Finally, the seller, lessor or agent may be liable for treble damages for any injuries sustained by the purchaser or lessee.

Will the failure to comply with these requirements of Title X give a purchaser or lessee the right to void the sales or lease transaction?

No. Both Title X and the regulations expressly provide that noncompliance can't be used to void or nullify the contract after ratification and cannot void any transfer of real estate. The only remedies open to the purchaser or lessee are for damages as discussed in Question 12 above.

What are the benefits of lead-based paint disclosure?

In most states it is already the broker's and sales associate's duty to advise buyers of known material defects in a property. An estimated two-thirds of all lawsuits against real estate professionals in the United States allege misrepresentation or failure to disclose property defects. Title X is expected to operate in congruence with existing state disclosure laws and will provide another layer of protection to all parties in the transaction involving properties with lead based paint. This protection comes in the form of the completed disclosure acknowledgment form which will provide proof that the seller (lessor) and purchaser (lessee) were provided with the necessary information required by law.

Many state laws now require, and most state REALTOR® associations encourage, the use of seller disclosure forms to ensure all parties involved in a real estate transaction are satisfied with the result. States that already have seller disclosure report that buyers are usually happier with their purchase and that makes them more likely to be repeat customers.

Title X, like most states with seller disclosure laws places the onus to reveal material property defects on the seller. Title X makes it clear that agents cannot be held liable for information withheld from the agent by the seller or lessor.

Finally, if the seller or lessor has already tested the property and it is found to be free of lead-based paint or lead-based paint hazards, that information can be used by the agent as a positive marketing tool. This is especially true in cases where they are trying to sell or rent a property to a family with young children

## **PRESENTING AND NEGOTIATING MULTIPLE OFFERS**

“When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their clients. This obligation to the client’s interests is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly.” (from Article 1 of the 2001 REALTORS® Code of Ethics.)

“REALTORS® shall submit offers and counter-offers objectively and as quickly as possible.” (Standard of Practice 1-6).

Perhaps no situation routinely faced by REALTORS® can be more frustrating, fraught with potential for misunderstanding and missed opportunity, and elusive of a formulaic solution than presenting and negotiating multiple purchase offers on the same property. Consider the competing dynamics. Listing brokers are charged with helping sellers get the highest price and the most favorable terms for their property. Buyers’ brokers help their clients purchase property at the lowest price and on favorable terms. Balanced against the Code’s mandate of honesty is the imperative to refrain from making disclosures that may not, in the final analysis, be in a client’s interests.

Will disclosing the existence of one offer make a second potential purchaser more likely to sign a full price purchase offer – or to pursue a different opportunity? Will telling several potential purchasers that each will be given a final opportunity to make their best offer result in spirited competition for the seller’s property – or in a table devoid of offers?

What’s fair? What’s honest? What’s to be done? Who decides? And why isn’t there a simple way to deal with these situations?

As REALTORS® know, there are almost never simple answers to complex situations. And multiple offer presentations and negotiations are nothing if not complex. But, although there isn’t a single, standard approach to dealing with multiple offers, there are fundamental principles to guide REALTORS®.

- Be aware of your duties to your client – both as established in the Code of Ethics and in state law and regulations.
- The Code requires you to protect and promote your client’s interests. State law or regulations will likely also spell out duties you owe to your client.
- The Code requires that you be honest with all parties. State law or regulations will likely spell out duties you owe to other parties and to other real estate professionals. Those duties may vary from the general guidance offered here. REALTORS® need to be familiar with applicable laws and regulations.
- Be aware of your duties to other parties – both as established in the Code of Ethics and in state law and regulation.
- Remember that the decisions about how offers will be presented, how offers will be negotiated, and ultimately which offer will be accepted, are made by the seller – not by the listing broker.
- When taking listings, explain to sellers that receiving multiple, competing offers is a possibility. Explain the various ways they may be dealt with (e.g. acceptance of the “best” offer; informing all potential purchasers that other offers are on the table and inviting them to make their best offer; countering one offer while putting the others to the side; countering one offer while rejecting the other offers, etc.).
- Explain the pluses and minuses of each approach (patience may result in an even better offer; inviting each offeror to make their “best” offer may produce a better offer(s) than what is currently on the table – or may discourage offerors and result in their pursuing other properties.)

- Explain that your advice is just that and that your past experience cannot guarantee what a particular buyer may do.
- Remember – and remind the seller – that the decisions are theirs to make – not yours, and that you are bound by their lawful and ethical instructions.
- If the possibility of multiple offers – and the various ways they might be dealt with – were not discussed with the seller when their property was listed and it becomes apparent that multiple offers may be (or have been) made, immediately explain the options and alternatives available to the sellers – and get direction from them.
- Be mindful of Standard of Practice 1-6's charge to “. . . submit offers and counter-offers objectively and as quickly as possible.”
- While the Code of Ethics does not expressly mandate “fairness” (given its inherent subjectivity), remember that the Preamble has long noted that “. . . REALTOR® has come to connote competency, fairness, and high integrity . . .”. If a seller directs you to advise offerors about the existence of other purchase offers, fairness dictates that all offerors or their representatives be so informed.
- Article 3 calls on REALTORS® to “. . . cooperate with other brokers except when cooperation is not in the client's best interest.” Implicit in cooperation is forthright sharing of information related to cooperative transactions and potential cooperative transactions. Much of the frustration that occurs in multiple offer situations results from cooperating brokers being unaware of the status of offers they have procured. Listing brokers should make reasonable efforts to keep cooperating brokers informed.
- Realize that in multiple offer situations only one offer will result in a sale and one (or more) potential purchasers will be disappointed that their offer was not accepted. While little can be done to assuage their disappointment, fair and honest treatment throughout the process; coupled with prompt, ongoing and open communication, will enhance the likelihood they will feel they were treated fairly and honestly. In this regard, “. . . REALTORS® can take no safer guide then that which has been handed down through the centuries, embodied in the Golden Rule, ‘Whatsoever ye would that others should do to you, do ye even so to them’” (from the Preamble to the Code of Ethics).

# **Questions and Answers on** **PRIVATE MORTGAGE INSURANCE** **and the New Federal Homeowner Protection Act of 1998**

## How the law works

The Homeowner Protection Act is designed to remove confusion in the private mortgage insurance (PMI) cancellation process. In summary, it provides:

### FOR MORTGAGES ORIGINATED ON OR AFTER JULY 29, 1999

**Mandatory Initial Disclosure** – At the time the transaction is consummated, the lender must provide written notice of when PMI may be cancelled based on payment schedule (for a fixed rate mortgage) or that the lender will notify the customer when the cancellation date is reached (for an adjustable rate mortgage).

**Borrower-Initiated Cancellation** – When the balance of the mortgage reaches 80 percent of the original value of the property, the borrower may request in writing that PMI be cancelled.

**Automatic Termination** – When the balance of the mortgage reaches 78 percent of the original value of the property, the lender must automatically terminate PMI, provided that payment is current.

### FOR ALL OTHER MORTGAGES

**Annual Disclosure** – The lender must provide an annual written statement detailing the rights of the borrower to cancel PMI should qualifications be met. The lender must also provide an address and phone number that the borrower may use to contact the servicer to determine if PMI may be cancelled.

#### What is Private Mortgage Insurance?

Private Mortgage Insurance (PMI) protects a lender against loss if a borrower stops making mortgage payments. It makes it possible for you to buy a home with as little as a 3-5 percent down payment.

#### Why do I need PMI?

Studies show that homeowners with less than 20 percent invested in a home are more likely to default on their loans, making low down payment mortgages risky to lenders. Lenders require PMI on low down payment mortgages to reduce their risk should the borrower default on the loan.

#### How does PMI help me?

Private mortgage insurance makes it possible to buy a home sooner because you don't have to put down as much money up front.

- First time buyers benefit because they do not have to save as much money to buy that first home.
- If you are trading up, PMI allows you to consider homes in a wider price range.
- Whether you are buying your first home or moving to another, you can make a smaller down payment and keep more of your savings for other uses.

#### Does PMI Offer any tax advantages?

The larger loan possible with PMI boosts your tax deductions for mortgage interest.

#### How much does it cost?

Premiums vary. They are determined by the size of the down payment, the type of mortgage and the amount of insurance. Premiums are typically included in your monthly mortgage payment. The average range for a \$100,000 loan is \$25 to \$65 per month. Different payment schedules are available. Contact your lender to discuss your options.

#### How to terminate your PMI

1—Pay down your mortgage

If the current balance of your mortgage is less than 80% of the original purchase price of your property, you may no longer require PMI. Contact your lender for more information.

2—Increase the value of your property.

If the value of your property has increased, due to home improvements or market conditions, you may no longer require PMI. If the current value of your property is less than 80% of the current value of your property, your lender may allow you to terminate PMI. Most lenders will require an appraisal (at cost to you). Contact your lender for more information.

Recent federal data has shown that the average home value in Massachusetts increased 7.9% in the past year alone. Now might be a good time to see if you qualify to cancel your PMI. Consult your lender for more information.

# **PROBATE**

**Overview:** As part of the work done in a title search a title examiner must not only search the Registry of Deeds but also the Registry of Probate. This is especially true as it relates to property of deceased persons, divorced persons and minor and incompetent persons. Upon an individual's death, their estate must be settled by the probate court. Simply stated, probate is the process of establishing the validity of a decedent's Will. Many difficulties may arise involving the sale of a deceased's property. All probate requirements must be met prior to the sale occurring in order to ensure a proper transaction. Probate requirements vary in complexity depending on the residency of the deceased, whether there is a valid will or not, whether there is a power of sale, and whether there are multiple owners. Understanding the probate process will better enable real estate brokers and salesmen in the sale of estate property.

**Relevant Law:** M.G.L. chapter 192 (Probate of Wills and Appointment of Executors)  
M.G.L. chapter 193 (Appointment of Administrators)  
M.G.L. chapter 202 (Sales of Real Property by Executors and Administrators)  
M.G.L. chapter 204 (Sales, Mortgages, Releases, Compromises, Etc. by Executors, Etc.)

## **Important Issues:**

### *Title after death of owner*

- *Where there is a surviving joint owner* – Real property held in joint ownership (as distinguished from tenancy in common) is not included in the deceased's probate estate if there is a surviving joint owner. In this case, the title to the property automatically passes to the surviving owner immediately upon the death of the deceased. This is called "the right of survivorship". However, it is necessary to obtain a release of the estate tax lien (M-792), even on jointly owned real property, where a death occurred within the past ten years.
- *Where there is a surviving tenant in common* – Unlike joint tenancy by the entirety, tenancy in common does not contain the right of survivorship. Therefore, upon the death of one tenant in common, their property interest does not automatically pass to the surviving tenant(s) in common. Instead, the deceased's property interest passes according to the terms of the decedent's Will or, if none, under the laws of intestacy. If the Will, if any, contains a power of sale, the executor of the Will needs to file a tax return and obtain a tax release. If no power of sale is provided in the Will, the executor must also obtain a license to sell the estate property. Where there is no Will, the laws of intestacy apply and in order to sell the decedent's property the administrator must apply to the court for a license to sell.
- *Where there is no surviving owner* – If there is no surviving owners, title to the decedent's property will pass according to the terms of his/her Will or, if no Will, under the laws of intestacy. If the Will, if any, contains a power of sale, the executor of the Will needs to file a tax return and obtain a tax release. If no power of sale is provided in the Will, the executor must also obtain a license to sell the estate property. Where there is no Will, the law of intestacy apply and in order to sell the decedent's property the administrator must apply to the court for a license to sell.

# RADON

This material about Radon is included for informational purposes only. You can be sure you will be asked questions about Radon by your clients and customers. Radon disclosure just might prove to be the next area of liability for REALTORS®. Two consumer guides on the problem of Radioactive Radon Gas in homes have been released by the Environmental Protection Agency: "A Citizen's Guide To Radon", and "Radon Reduction Methods-A-Homeowner's Guide", and are available without charge from EPA Public Information Center, Mail Code PM-211B, 820 Quincy St., NW, Washington, D.C. 20011.

**Overview:** Radon is an odorless, tasteless gas produced naturally in the ground by the normal decay of uranium and radium. Radon can lead to the development of radioactive particles which can be inhaled. Studies indicate that extended exposure to high levels of radon may increase the risk of developing lung cancer. The United States Surgeon General has stated that second to smoking, radon is the largest cause of lung cancer. It is estimated that nearly 1 out of 15 homes in the United States has an elevated level of radon.

**Relevant Law:** M.G.L. Chapter 93 A (Massachusetts Consumer Protection Act).

**Important Issues:** Although statute does not require the buyer or seller to test for the presence of radon, buyers who chose to have a test done on a home should be encouraged to have the testing done properly in accordance with manufacturers and/or professional specifications to ensure accuracy.

## Where does radon come from?

Radon comes from the natural breakdown (radioactive decay) of uranium. Radon can be found in high concentrations in soils and rocks containing uranium, granite, shale, phosphate, and pitchblende. Radon may also be found in soils contaminated with certain types of industrial wastes, such as the byproducts from uranium or phosphate mining. In outdoor air, Radon is diluted to such low concentrations that it is usually nothing to worry about. However, once inside an enclosed space (such as a home) Radon can accumulate. Indoor levels depend both on a building's construction and the concentration of Radon in the underlying soil.

## How does radon affect me?

The only known health effect associated with exposure to elevated levels of Radon is an increased risk of developing lung cancer. Not everyone exposed to elevated levels of Radon will develop lung cancer, and the time between exposure and the onset of disease may be many years.

Scientists estimate that from about 5,000 to about 20,000 lung cancer deaths a year in the United States may be attributed to Radon. (The American Cancer Society estimated that about 130,000 people died of lung cancer in 1986. The Surgeon General attributes around 85 percent of all lung cancer deaths to smoking.)

Your risk of developing lung cancer from exposure to Radon depends upon the concentration of Radon and the length of time you are exposed. Exposure to a slightly elevated Radon level for a long time may present a greater risk of developing lung cancer than exposure to a significantly elevated level for a short time. In general, your risk increases as the level of Radon and the length of exposure increases.

## When did radon become a problem?

Radon has always been present in the air. Concern about elevated indoor concentrations first arose in the late 1960's when homes were found in the West that had been built with materials contaminated by waste from uranium mines. Since then, cases of high indoor Radon levels resulting from industrial activities have been found in many parts of the country. We have only recently become aware, however, that houses in various parts of the U.S. may have high indoor Radon levels caused by natural deposits of uranium in the soil on which they are built.

## How does radon get into the home?

Radon is a gas which can move through small spaces in the soil and rock on which a house is built. Radon can seep into a home through dirt floors, cracks in concrete floors and walls, floor drains, sumps, joints, and tiny cracks or pores in hollow-brick walls.

Radon also can enter water within private wells and be released into a home when the water is used. Usually, Radon is not a problem with large community water supplies, where it would likely be released into the outside air before the water reaches a home. (For more information concerning Radon in water, contact your state's Radiation Protection Office.)

In some unusual situations, Radon may be released from the materials used in the construction of a home. For example, this may be a problem if a house has a large stone fireplace or has a solar heating system in which heat is stored in beds of stone. In general, however, building materials are not a major source of indoor radon.

What tests are available to test for indoor radon?

The quickest way to test for radon is with short-term tests. Short-term tests remain in the home for 2 days to 90 days, depending on the test. Short-term detectors include: charcoal canisters; alpha track; electret ion chamber; continuous monitors; and charcoal liquid scintillation. Long-term tests remain in the home for longer than 90 days, therefore providing a year-round average radon level. The average may better assist a homeowner in determining whether to make repairs and if so, what types. Long-term tests include alpha track and electret detectors.

Who is at greatest risk of becoming ill as a result of prolonged radon exposure?

While not everyone exposed to radon will develop lung cancer or other symptoms, studies have shown that smokers and children have the greatest vulnerability to radon exposure and lung cancer.

What can be done to reduce exposure to indoor radon?

The federal government is studying the effectiveness of various ways to reduce high concentrations of radon in homes. The most obvious remedy is to increase ventilation of the home which allows radon to escape. Another approach is to prevent radon from getting into the home, but determining how gas enters a building poses a major difficulty. A booklet describing several methods to reduce high concentrations of indoor radon can be obtained from the Massachusetts Department of Public Health's Radiation Control Program.

For more information please contact the following:  
Massachusetts Association of REALTORS® at (800) 370-LEGAL  
Massachusetts Department of Public Health's Radiation Control Program at (617) 727-6214 Or (413) 586-7525

## **RADON MYTHS**

**MYTH:** Scientists are not sure that radon really is a problem.

**FACT:** Although some scientists dispute the precise number of deaths due to radon, all of the major health organizations (like the Center for disease control, the American Lung Association, and the American Medical Association) agree with estimates that radon causes thousands of preventable lung cancer deaths every year. This is especially true among smokers, since the risk to smokers is much greater than to non-smokers.

**MYTH:** Radon testing devices are not reliable and are difficult to find.

**FACT:** Radon testing can be conducted by a professionally trained RMP listed or state certified radon tester.

Active radon devices can continuously gather and periodically record radon levels to reveal any unusual swings in the radon level during the test.

Reliable testing devices are also available through the mail, in hardware stores and other retail outlets. Call your state radon office for a list of radon device companies that have met EPA requirements for reliability or are state certified.

**MYTH:** It is difficult to sell a home where radon problems have been discovered.

**FACT:** Where radon problems have been fixed, home sales have not been blocked. The added protection could be a good selling point.

**MYTH:** I have lived in my home for so long, it does not make sense to take action now.

**FACT:** You will reduce your risk of lung cancer when you reduce radon levels, even if you lived with a radon problem for a long period of time.

**MYTH:** Short term tests cannot be used for making a decision about whether to reduce the home's high radon level.

**FACT:** Short-term tests may be used to decide whether to reduce the home's high radon levels. However, the closer the short-term testing result is to 4pCi/L, the less certainty there is about whether the home's year round average is above or below that level. Keep in mind that radon levels below 4pCi/L still pose some risk and that radon can be reduced in some homes to 2pCi/L or below.

**MYTH:** Radon testing is difficult and time consuming.

**FACT:** Radon testing is easy. You can test your own home or you can hire an EPA listed or state certified radon tester. Either approach takes only a small amount of the homeowner's time or effort.

**MYTH:** Homes with radon problems cannot be fixed.

**FACT:** There are solutions to radon problems in homes. Thousands of home owners have already lowered elevated radon levels in their homes. Radon levels can be readily lowered for \$500 to \$2,500. Call your state radon office for a list of contractors that have met EPA requirements or are state certified.

**MYTH:** Radon only affects certain types of homes.

**FACT:** Radon can be a problem in all types of homes such as old homes, new homes, drafty homes, insulated homes, homes with basements and homes without basements. Construction materials and the way the home has been built may also affect radon levels.

**MYTH:** Radon is only a problem in certain parts of the country.

**FACT:** High radon levels have been found in every state. Radon problems do not vary from area to area, but the only way to know the home's radon level is to test.

**MYTH:** A neighbor's test result is a good indication of whether your home has a radon problem.

**FACT:** It is not. Radon levels vary from home to home. The only way to know if your home has a radon problem is to test it.

**MYTH:** Everyone should test his or her water for radon.

**FACT:** While radon gets into some homes through water, it is important to first test the air in the home for radon. If high radon levels are found and the home has a well, call the Safe Drinking Water Hotline at 1-800-426-4791, or your state radon office for more information.

**EPA Recommends:**

- If you are planning on buying a home or selling your home, have it tested for radon.
- For new homes, ask if radon resistance construction features have been used.
- Fix the home if the radon level is 4 picocuries per liter (pCi/L) or higher.
- Radon levels less than 4pCi/L still pose a risk, and in many cases can be reduced.
- Take steps to prevent device interference when conducting a radon test.

For more information on how to reduce your radon health risk, ask your state radon office to send you these guides: If you plan to make repairs yourself, be sure to contact your state radon office for a current copy of EPA's technical guidance on radon reduction, "Radon Reduction Techniques for Detached Houses-Technical Guide" Contact the EPA's Drinking Water Hotline 1-800-426-4791 for information on radon in water.

# SMOKE DETECTORS

The Commonwealth of Massachusetts has established laws regarding smoke detectors, lead paint and urea-formaldehyde insulation and it is recommended that these laws be included in any Purchase and Sales Agreements for the transfer of real property.

## SMOKE DETECTORS

It is mandatory in the Commonwealth, upon the transfer of real property, to have approved smoke detectors in place. It is incumbent upon REALTORS® to inform their sellers well in advance of passing papers that an inspection must be conducted by the fire department. Please do your part by setting up an inspection well ahead of paper passing.

The requirements with respect to sprinkler systems, automatic fire warning systems, and smoke and heat detectors, are set forth in M.G.L. c. 148, §§26 and 26A through 26F. The last section 26F, was adopted in 1979 to become effective on January 1, 1982, and since that date has required the installation of smoke detectors in all buildings occupied in whole or in part for residence purposes, upon the sale or transfer of title. This applies to buildings not regulated by §§26A, 26B or 26C, and thus covers buildings containing fewer than 6 dwelling units, including single family residences. Further amendments to §§26D and 26E, effective March 22, 1983, imposed more strict requirements as to the type and characteristics of prescribed smoke detectors.

## RECORDING TITLE

Overview: Every state has a recording statute that specifies the type of documents that may be recorded with the Registry of Deeds (e.g. – deeds, mortgages, leases, court judgments, ...). More significantly, however, recording statutes resolve potential conflicts which may arise between successive grantees (e.g. – buyers) of the same property. For example, if a property owner sells his entire property to two different buyers, which buyer actually owns the land? By registering all deeds with the Registry of Deeds, a property owner is effectively putting the world on notice that he/she is the owner of the property described in the deed. So long as the deed is properly recorded, everyone will be considered to have knowledge of the deed even if they do not perform a title search at the registry and actually see the deed. Therefore, the recorded owner of the property will likely prevail against subsequent persons claiming ownership to the same property.

Relevant Law: M.G.L chapter 183, § 4.

Important Issues: There are three types of recording statutes used in the United States: race, notice, and race-notice statutes. Massachusetts is a notice jurisdiction. Unlike race jurisdictions, the first purchaser to record a property deed does not automatically prevail over additional purchasers of the same property who have failed to record their deed. In Massachusetts, if a seller conveys the same property to both A who does not record his deed and then later to B, B will prevail over A as to ownership right so long as B has no knowledge of the seller's conveyance of the property to A prior to B's purchase. If B bought the property in good faith with no notice of A's purchase, B would be a bona fide purchaser. Notice statutes protect bona fide purchasers whether they record first or not. A could prevail over B, however, if A could show that B had actual notice of A's purchase of the property. If A had properly recorded his deed to the property, this would have been sufficient to put B on notice of A's interest in the property. Recording a property deed protects an owner from ownership claims by third parties.

Frequently Asked Questions:

Q: What are the benefits of recording deeds with the Registry of Deeds? Is a deed invalid if not recorded?

A: Generally, recording a deed does not affect its validity. An unrecorded deed is valid but is not afforded the same protection as recorded deeds. Recording deeds and other documents with the Registry of Deeds has multiple purposes:

- It establishes a system of public recordation of land titles. This system allows anyone to determine who owns any particular parcel of land.
- The registry creates a secure location where important documents pertaining to real property may be kept.
- Recording documents protects property purchasers and lien creditors who record their deeds and liens, respectively, against prior unrecorded interests.

Q: Do leases need to be recorded with the Registry of Deeds?

A: M.G.L. chapter 183, section 4 states that a lease for longer than 7 years should be recorded with the Registry of Deeds in order to put the world on notice as to the tenant's interest in the land. If the lease is not recorded, then the tenant, in defense of an ejectment action by the new owner of the property, must show that the new owner had actual notice of the tenant's lease and therefore bought the property subject to the tenant's rights under the lease. If the tenant recorded the lease, the new owner would have to "record" notice of the tenant's rights and could not rightfully evict the tenant.

Q: Does a recorded deed protect against all subsequent ownership claims by third parties?

A: No. Although recording statutes offers extensive protection and assurance to property owners, it is not an absolute defense against all claims of ownership by third parties. There are several scenarios in which a recorded deed does not protect a property owner's interest:

- Chain of Title: The recording of an instrument gives record notice to subsequent purchasers only if that searcher would have found the document using generally accepted searching practices (e.g. use of grantor and grantee indexes). A recorded instrument that would not be found using generally accepted practices is said to be outside the searcher's chain of title and prevents the giving of record notice and its corresponding protections.
- Recordable Documents: Only recordable documents will give "record notice" when placed on the lands record. Recordable documents include, but are not limited to, deeds, mortgages, long-term leases, judgment liens, and tax liens. Short-term leases are generally exempted from recorded statutes.
- Indefinite References: If a recorded document contains an indefinite reference to another document concerning an interest in the property, the reference may be ignored by the searcher. Absent reference to the registry book and page number, the indefinite reference will not be binding on the searching party.
- Adverse Possession: Adverse possession is completely outside of the recording system. If a person adversely possesses property, the adverse possessor will not be in the chain of title unless the adverse possessor obtains a court judgment declaring the person as record title holder or gets the deed to the land from the record title holder and then records it himself.

For more information please contact the following:

Massachusetts Association of REALTORS® at (800) 370-LEGAL

This publication is provided as a service to members of the Massachusetts Association of REALTORS® and is intended for educational use only. The Massachusetts Association of REALTORS® does not accept responsibility for any misinterpretation or misapplication by the reader of the information contained in this article. The publishing of this material does not constitute the practice of law nor does it attempt to provide legal advice concerning any specific factual situation. FOR ADVISE ON SPECIFIC LEGAL PROBLEMS CONSULT LEGAL COUNSEL.

Opinion or suggestions in this publication do not necessarily represent the official policies or positions of the Massachusetts Association of REALTORS®.

# RESPA

Overview: The Real Estate Settlement Procedures Act (RESPA) was enacted in 1974 to provide consumers with disclosure about closing costs and to prohibit unearned fees (kickbacks/referral fees). Subsequent amendments to RESPA pertain to Controlled Business Arrangements (CBA) and Computerized Loan Originations (CLO). Ignorance is not a defense to a RESPA violation. Education is required to ensure complete compliance with all RESPA requirements. An example of a RESPA offense would be if a real estate broker or sales associate accepted money from mortgage lenders for steering homebuyers to the lenders. Insufficient disclosure to consumers by firms involved in CBAs is another common violation. RESPA is a difficult federal law. Violations can be a serious federal crime. REALTORS® are urged to secure particular, current, legal advice applicable to their specific situation before they act.

Relevant Law: The Real Estate Settlement Act (RESPA), P.L. 93-533.  
24 CFR Part 3500 (1993)

## Important Issues:

Kickbacks and referral fees prohibited -- Generally, the paying or receiving of any fee or thing of value for the referral of business related to the settlement without rendering a service is a RESPA violation. It is key that any payment is in return for a service provided. Settlement services are broadly defined to include more than just the traditional services performed by a lender, mortgage broker or title company, such as origination, processing, or funding a loan. Rendering credit reports, termite inspections, and home inspections are all considered settlement services. RESPA does permit (1) payments pursuant to cooperative brokerage and referral arrangements between real estate agents and brokers; (2) payment of any person of bona fide salary or compensation or other payments of goods or facilities actually furnished or for services actually performed; (3) an employer's payment to its own employees for any referral activities; and (4) any payment by a borrower for CLO services, so long as the disclosure set forth by HUD is provided to the borrower (see below). Fees that are not permitted or received under RESPA are not legalized by disclosure or consent.

Computerized Loan Originations (CLO) -- The new RESPA rule implementing a part of the act was effective on December 2, 1992, and promotes one-stop shopping in homebuying as in the best interest of consumers. These regulations allow real estate firms to legally provide certain real estate settlement services (e.g. rendering of services by a mortgage broker, processing or funding of federally-related mortgage loans, etc.) or to be affiliated with other real estate settlement service providers. CLOs are computerized systems for delivering residential mortgages loan offerings of one or more lenders to consumers at a real estate office. Specific written disclosure to consumers is required with CLOs.

Controlled Business Arrangement (CBA) -- A controlled business arrangement (CBA) is a diversified company created to "package" together related real estate services. In a CBA, a person in position to refer settlement service business has either an affiliate relationship or ownership interest of over one percent in another business which provides settlement services, and directly or indirectly refers business to that provider. An example of such a person would be a licensed real estate broker who is part owner of a mortgage lending company. CBAs are permitted under RESPA if no payment has been made based on the number of referrals (the referring party may only receive return on the investment). If the controlled-business arrangement exists, the person making the referral must meet the following three conditions in order to comply with RESPA: (1) the person making the referral gives an appropriate Controlled-Business Arrangement Disclosure Statement to each person to whom the referral is made; (2) with certain exceptions, the person to whom the referral is made not required to use the referred settlement service provider; and (3) the only thing of value received from the arrangement is a return on interest or franchise relationship.

## Important things to remember about RESPA --

- There can be no referral fees between settlement service providers. This means a lender may not give a REALTOR® a referral fee. The REALTOR® must perform a settlement service, such as the mortgage origination. Your fee must be based on providing a tangible service.
- Do not accept anything of value from mortgage brokers/lenders for loan referrals.

## Frequently Asked Questions:

Q: What are the penalties for a RESPA violation?

A: Any person who violates RESPA's provisions may be fined up to \$10,000 or imprisoned for up to one year, or both. Additionally, the person violating RESPA is liable to the person charged for the settlement service for three times the amount paid for the settlement service. In addition to criminal penalties, RESPA violations are being combined with other private lawsuit claims such as antitrust violations, exposing violators to additional civil liability.

Q: Can a real estate licensee require a client to use a settlement service provider with which the licensee has a CBA?

A: No. A person making such a referral may not require the use of a particular settlement service provider.

Q: May a broker or salesman rent space (and collect rent from) a lender for the lender's use in making loans to the broker's or salesman's customers?

A: Yes. However, the rent must reflect the fair market value of the space, without regard to the value or number of loans made through the use of that space. Affiliated licensees and lenders also may need to follow the CBA rules. FHA mortgagees also need to comply with the special rules.

Q: Are promotional and educational activities not conditional on the referral of business permissible?

A: Yes. Promotional and educational activities are not conditional on the referral of business and do not involve defraying expenses that otherwise would be incurred by a person in a position to refer the business are permissible.

For more information please contact the following:

Massachusetts Association of REALTORS® at (800) 370-LEGAL  
U. S. Department of Housing and Urban Development,  
RESPA Enforcing Unit at (202) 708-4560  
Office of the General Counsel (202) 708-9985

This publication is provided as a service to members of the Massachusetts Association of REALTORS® and is intended for educational use only. The Massachusetts Association of REALTORS® does not accept responsibility for any misinterpretation or misapplication by the reader of the information contained in this article. The publishing of this material does not constitute the practice of law nor does it attempt to provide legal advice concerning any specific factual situation. FOR ADVISE ON SPECIFIC LEGAL PROBLEMS CONSULT LEGAL COUNSEL.

Opinion or suggestions in this publication do not necessarily represent the official policies or positions of the Massachusetts Association of REALTORS®.

© 1998 Massachusetts Association of REALTORS®

## **RIVERS PROTECTION ACT SUMMARY**

On August 7, 1996 Governor Weld signed into law the Rivers Protection Act. Unlike the original bill which mandated that riverfront areas would be turned into no-build zones, the new law is an extension of the Wetlands Protection Act and is a performance standard based approach. In short, the new law will allow local authorities to permit property owners to develop their land within the riverfront area if they can (1) establish by a preponderance of the evidence such proposed work will have no significant adverse impact on the riverfront area for the environmental interests or purposes of the Act, and (2) that there is no practicable and substantially equivalent economic alternative to the proposed project with less adverse effects on the purposes of the Act. What the law considers practicable and substantially economically equivalent may depend on the type of development proposed and the cost of the alternative to the owner.

***Q: What are the purposes (environmental interests) protected under the Act?***

**A:** The purposes of the Rivers Protection Act are to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries.

***Q: What waterways are included under the Rivers Protection Act?***

**A:** The act defines a river as a natural flowing body of water that empties into any ocean, lake, or other river and which flows throughout the year.

***Q: How big is the riverfront area?***

**A:** For most communities, the riverfront area is that area of land situated between a river's mean annual high water line and a parallel line located two hundred feet away, measured horizontally from the river's mean annual high water line. In fourteen communities (Boston, Brockton, Cambridge, Chelsea, Everett, Fall River, Lawrence, Lowell, Malden, New Bedford, Somerville, Springfield, Winthrop, and Worcester) and in densely developed areas (defined as areas of ten acres or more used for industrial purposes) the riverfront area is reduced to 25 feet.

***Q: Are all existing structures, roads, clearances, excavations, driveways, septic systems, and parking lots within the riverfront area exempt from the Act?***

**A:** Yes. Also exempt from the Rivers Protection Act are lands now or formerly associated with historic mill complexes included, but not limited to, the mill complexes in the Cities of Holyoke, Tauton, Fitchburg, Haverhill, Methuen, and Medford.

***Q: What about new construction/development within the riverfront area?***

**A:** That depends. The proposed development is exempt if any of the following conditions have been met: (1) a draft environmental impact report has been prepared and submitted before November 1, 1996 (The Department of Environmental Protection may grant an extension to this date for just cause); (2) a building permit conforming to local requirements has been filed for on or before October 1, 1996 and the permit is granted on or before April 1, 1997 (local conservation commission may grant one sixty day extension); or (3) a definitive plan of subdivision has been approved or endorsed under section 81U of Chapter 41 of the Mass. General Laws on or before August 1, 1996. If the proposed development does not fit into one of these three exemptions then it will most likely have to meet the standards of the Act in order to be eligible to receive local approval.

***Q: When does this law go into effect?***

**A:** The Rivers Protection Act went into effect on August 7, however, the regulations under which it will be implemented have not been written, and it is expected that the state will take at least several months to complete the regulations. It is important to note that the Act creates an eight-member riverfront advisory committee which will include individuals from the real estate and development community who will help with the drafting of those regulations.

***Q: Will the state buy my property along a river if I cannot develop it the way I would like?***

**A:** Maybe. The Act authorizes thirty million dollars in bonds for the acquisition of riverfront property. The commissioner of the department of fisheries, wildlife and environmental law enforcement will be responsible for the acquisition of riverfront property. The state is also required to study the feasibility of developing transferable development right for properties impacted by the Rivers Protection Act.

# REALTOR SAFETY

## **The Safety Minute: A Real Estate Agents Guide to Taking A Minute for Safety**

We have all heard about the Real Estate agent who has become an FBI crime clock statistic...a body found in a vacant house. Most of you figure it's not going to happen to you. You're right, chances are it won't. Guess what? It just might. The crime clock ticks away all day and claims its victims without prejudice. A violent crime occurs every 16 seconds\*, a theft every 4 seconds\*, a rape every 46 seconds\*, and a murder every 21 minutes\*. As the clock ticks, mothers, fathers and children all over the world are affected by the crimes against their loved-ones.

Do you play the lottery? You are more likely to be murdered on the job than to win the lottery. Do you wear a seatbelt? A person is equally as likely to be assaulted as they are to be injured in a motor-vehicle accident. If you have never been affected by crime, you are due!

I don't train people on self-protection by scaring them; I make them aware of their options. I show them all the different things they can do to avoid and remove themselves from a dangerous situation. Safety practitioners have done a great job over the years of compiling information and showing you proactive ways of implementing a plan for your personal security. I have condensed this information and put my own spin on it and present it to you in an orderly manner with a unique perspective.

In our hustle and bustle world, we become complacent in certain areas of our life such as eating properly, sleeping enough, exercising, spending quality time with our family, and most of all...Personal Safety. It's so easy to discount the immense value of each of these whole living qualities. When we lack self-discipline in these areas, every aspect of our life and the lives of everyone around us suffers.

A plan of action consists solely of each and every person being responsible for his or her own safety. Nobody can do it for you.

- 1) **Pre-qualify.** It is to your benefit that a potential client buying a home is pre-qualified. Therefore all their identification and information will be noted. Someone who is pre-qualified and meets you at the office is less likely to be a rapist/murderer. However, they still could be. Don't let your guard down.
- 2) **Use the cell phone.** Before showing a home make it known to your co-workers, a spouse or a friend where you are going and when you will be back. Have them call you at a designated time to check on you. Have them set an alarm on their pager/cell phone as a reminder. A system where you call in has its advantages, but this is more effective.
- 3) **Use predetermined code words** to alert your caller of distress. Utilize green, yellow, and red...a traffic light, for levels of distress. For example say to your caller "its in the green folder" letting your caller know that you are fine. Or "its in the yellow folder" alerting your caller that the situation is shaky and you might need assistance. And if you say "its in the red folder" then it is that persons responsibility to call for help NOW. Of course if things are yellow, you should make a call then. Tell someone in the office or a spouse to get your red folder, it's the one that has "123 Main St", the property address you are currently at. If possible, tell the client that reception in the house is bad and you need to go outside to make the call. Don't go back in.
- 4) **Of course, take your own car.**
- 5) **Common sense says don't wear jewelry.** A 3-5 thousand dollar diamond buys a lot of crack. It is a good idea however to have "chump change" available. Chump change is a few ones and fives with elastic around them that could satisfy your assailant.
- 6) **Lie, lie, lie.** Once you get to the appointment tell the client that "another real estate agent will be arriving any minute now to look at the property with us." Thus creating a problem for a would-be attacker of getting caught.

- 7) **Pay attention to your intuition**, trust your gut, and don't discount any troubling feelings you might have about your new client. If anything seems wrong, then it IS wrong. Cancel if necessary. This feeling is a survival mechanism given to you by the same someone, who put it in dogs, cats, birds, mice, lions, tigers, and bears. Use it.
- 8) **Go for the throat**. Utilize the buddy system if possible. If not, you better know how to defend yourself. Go for the eyes, throat, groin and the instep of the foot if they grab you from behind. Fighting from the ground is an advantage that few people realize they have. Kicking the knees or groin is very effective from the ground.
- 9) **Follow the leader**. Letting them go in front of you and not going into basements are standard safety measures. However, if they plan to overpower you it's not going to matter. Your responsibility is to defend yourself if necessary. Scream, gouge, bite, and fight with whatever you have. Have a pepper spray in you hand in a coat pocket or have a ball point pen ready to jab.
- 10) **Leave the front door wide open** regardless of the time of year. If the homeowner is there this will not be necessary.
- 11) **Don't judge a book by its cover**. Con men are liars. They are usually mentally ill. All they know is the art of deception. Their way of survival is via manipulation. Expect them to show up in a nice car, well dressed, maybe with a wife and kids tagging along. They might even have a business card saying they are a doctor or a lawyer. They might even be a politician. It might not be until the second or third meeting that they decide to pounce. They like to gain your trust, you feel comfortable carrying cash and jewelry, and they make their hit. Remember that they're cons, it's a game to them.
- 12) **Open houses**. You know the drill. Take a friend, bring a cell phone, and switch it up. If a creepy person shows up, (someone who makes you feel uncomfortable) tell them that it's under contract. Lie if necessary, this way they are less likely to show up to the next open house. Worst case scenario, leave the home and seek assistance. Everything above applies.
- 13) **Self-Defense**. Don't ever forget, go for the eyes, throat, groin, or instep of the foot if they attack from behind. You are worth fighting for. You have more power than you think. In previous studies 80% of women who fought back in an attack situation got away. Obviously men are concerned for their security. Everything described here is of course meant for the male population as well. I refer to security and statistics related to women because of the overwhelming crimes against them.

\*statistics are from the FBI and National Victims Center

Source: **The Safety Minute, Robert Siciliano, [www.safetyminute.com](http://www.safetyminute.com)**

# **SECURITY DEPOSITS**

**Overview:** In 1978, the Massachusetts Legislature enacted a detailed statute proscribing extensive procedures relative to the treatment of security deposits by landlords. As a result of this statute, landlords are confronted with a series of affirmative requirements that they must fulfill in order to protect themselves from potential liability. Failure by a landlord to follow these statutory requirements could result in the landlord being liable for mandatory damages equal to three times the amount of the security deposit at issue.

Since REALTORS® often times act as rental agents for landlords, it is crucial that REALTORS® are aware of the affirmative duties relative to the handling of rental property security deposits. Although REALTORS® may be indemnified from liability by the landlord, it is neither good legal nor business practice to mishandle security deposits. The law clearly makes non-compliance a costly mistake.

**Relevant Law:** M.G.L. Chapter 186, Section 15B (as amended by chapter 553 of the Acts of 1978 and by chapter 645 of the acts of 1983)

**Important Issues:** Prior to or upon the commencement of a tenancy, the landlord or his/her agent may require the tenant to pay the first month's rent, the last month's rent, a security deposit equal to one month's rent, and the cost of a new lock and key. The law is specific in its requirements that no more than one month's rent may be required from the tenant as security deposit. If the landlord or his/her agent requires a security deposit, the landlord or the agent are required to do the following: (1) provide the tenant with a detail written receipt; (2) provide the tenant with a detailed statement describing the condition of the rental unit; (3) deposit money in a bank account separate from the landlord's finances; and (4) maintain detailed records of all deposits and repairs.

**Security Deposit Receipt:** A landlord or his/her agent who collects a security deposit must, at the time of receiving the deposit or within 10 days after the start of the tenancy, whichever is later, provide the tenant with a written receipt which includes the following information: (i) the amount of the security deposit; (ii) the name of the person receiving the deposit and the name of the landlord (if different from the person receiving the deposit); (iii) the date the deposit was received; (iv) the address and the unit number of the rental property; and (v) the signature of the recipient of the deposit.

**Statement of Condition:** A landlord or his/her agent who collects a security deposit must, at the time of receiving the deposit or within 10 days after the start of the tenancy, whichever is later, provide the tenant with a written statement of the present condition of the rental property. The law requires that this statement of condition contain certain language that is set forth in M.G.L. Chapter 186, Section 15B 2(c). Consult legal counsel to ensure that this required language is properly included in the statement. In addition, the statement of condition must contain a complete listing of any damage then existing in the premises, including, but not limited to, any violation of the state sanitary code or state building code. This statement must be signed by the landlord or his/her agent.

Within 15 days of receipt of the statement of condition from the landlord, the tenant has the right to either sign the landlord's statement or submit the landlord a separate list of damages to the rental property. Within 15 days of receipt of the tenant's list, the landlord must return a copy of said list to the tenant with either the landlord's signed agreement with the content of the tenant's list or a clear statement of disagreement with the tenant's list. These statements of condition are important records in order to ensure that either party will be successful in defending against the others' claims of damages of the lack thereof to the rental property. Therefore, it is crucial that these statements are detailed and meet the statutory requirements.

**Separate Bank Accounts:** A security deposit must be held by the landlord or his/her agent in a separate, interest bearing bank account within a bank in Massachusetts. Failure to comply with this requirements entitles the tenant to the immediate return of his/her security deposit. It is important to note that vacation or recreation rentals of 100 days or less are exempt from this requirement.

Within 30 days of receipt of the security deposit, the landlord or his/her agent must provide the tenant with a receipt which contains the following information; (i) the name and address of the bank where the security deposit is held; (ii) the amount of the deposit; and (iii) the account number of the bank account.

Interest on the security deposit must be paid to a tenant by a landlord who holds the deposit for one year or longer. Interest paid shall equal 5 percent or the actual interest paid by the bank, whichever is less. Accrued interest must be paid at the end of each year. In the event that a tenancy is terminated before the anniversary date of the tenancy, the tenant shall receive all accrued interest within 30 days of such termination. The landlord is required to provide the tenant with a detailed statement containing the following information: (i) the name and address of the bank where the deposit is held; (ii) the amount of the deposit; (iii) the account number; (iv) the amount of interest payable to the tenant; and (v) a notification that the tenant may deduct the interest from the tenant's next rental payment. If the landlord fails to pay the tenant all accrued interest within 30 days following the anniversary date of the tenancy, the tenant may deduct the interest due from his/her next rent payment. The landlord may pay the tenant all accrued interest within 30 days following the termination of tenancy.

**Return of Security Deposits:** A landlord must return the balance of a security deposit within 30 days of the termination of the occupancy under a tenancy at will or at the end of the tenancy as stated in a written lease. The landlord may only deduct the following from a security deposit; (i) any unpaid rent which has not been legitimately withheld or deducted by the tenant; (ii) any unpaid real estate taxes which the tenant is required to pay; and (iii) a reasonable amount of repair damage caused by the tenant, excluding reasonable wear and tear. For damage deductions, the landlord must, within the same 30 day period, provide the tenant with an itemized list of damages including repair estimates, bills, receipts, etc. It is here that a thorough statement of condition is necessary to minimize disputes between landlords and tenants over new damage to the leased premises.

In addition, the statute contains extensive requirements relative to the transfer of security deposits to new landlords, vacation and recreational rentals, and waivers. Consult legal counsel to ensure compliance with these and all other statutory requirements.

#### Frequently Asked Questions

**Q: Are vacation rentals subject to the same security deposit requirements as other types of rentals and leases?**

A: No. Vacation and recreational rentals of 100 days or less or exempt from many of the statutory requirements. For example, unlike other leases, landlords of vacation rentals may charge pet deposits. Vacation deposits need not be placed in separate, interest bearing accounts. In addition, landlords do not have to return security deposits within 30 days of the termination of the tenancy. Consult legal counsel to obtain a complete list of the security deposit requirements for vacation rentals.

**Q: What are the penalties if a landlord fails to comply with the statutory requirements regarding security deposits?**

A: A landlord loses his/her right to keep any portion of a security deposit even if the tenant causes damage to the rental unit if the landlord: (i) fails to deposit the security in a separate interest bearing account; (ii) fails to provide the tenant with an itemized list of damages, if any, within 30 days after the termination of the tenancy's occupancy; (iii) includes within the lease any provisions in conflict with the statute or attempts to obtain a waiver from the tenant of his/her rights under the statute; (iv) fails to transfer the tenant's security deposit to the new owner of the rental unit; or (v) fails to return the security deposit plus interest within 30 days after the termination of the tenancy. If the landlord fails to comply with clauses (i), (iv), or (v) above, the tenant may be entitled to receive damages equal to three times the amount of the security deposit or balance to which the tenant is entitled plus 5 percent interest which is calculated from the date when the payment was due to the tenant, plus court costs and reasonable attorney's fees.

For more information please contact the following:

Massachusetts Association of REALTORS® at (800) 370-LEGAL.

This publication is provided as a service to members of the Massachusetts Association of REALTORS® and is intended for educational use only. The Massachusetts Association of REALTORS® does not accept responsibility for any misinterpretation or misapplication by the reader of the information contained in this article. The publishing of this material does not constitute the practice of law nor does it attempt to provide legal advice concerning any specific factual situation.

© 1998 The Massachusetts Association of REALTORS®

# SEX OFFENDER REGISTRY LAW

Mass G.L. c. 6, §§ 178 C-O

## I. Establishment of the Sex Offender Registry

Applies to individuals, adult or juvenile, convicted/adjudicated delinquent for a sex offense or released from custody, parole or probation for a sex offense on or after August 1, 1981.

Offenses covered:

Indecent Assault & Battery  
Rape;  
Rape of a Child;  
Assault with Intent to Rape;  
Kidnapping of a Child;  
Open & Gross/ Lewd & Lascivious Behavior;  
Unnatural/Lascivious Acts with a Child; and  
Attempts to Commit any of these offenses.

The Registry will be maintained by Criminal History Systems Board. File will include:

- a) Name of the offender and aliases;
- b) Social security number/date of birth;
- c) Home/work addresses;
- d) Physical description;
- e) Photo and fingerprints;
- f) Date/place & description of offense;
- g) Any other helpful identifying information; and
- h) Any information useful in assessing risk of recidivism.

Source of information for the Registry will be:

- a) From agency with custody of offender at least 30 days prior to his release;
- b) From probation or parole agency supervising offender within 5 days of assuming supervision or by October 1, 1996 – whichever is last;
- c) Court which enters a conviction/adjudication but does not impose an immediate committed sentence;

For (a) (b) and (c) above, the agency or court shall notify the offender, in writing, of his obligation to register with the local police department. The offender must acknowledge, in writing, that he has been so notified. The offender must register within two days of the operative event.

- d) All offenders who are required to register but are not presently in custody or under supervision will have notice sent to their last known address notifying them of their obligation to register by October 1, 1996. The RMV shall also notify anyone applying for or renewing a license of his obligation to register if his is an offender.

## II. Annual Registration

The information which the offender provides at his initial registration must be verified annually both in person and by mail. In person verification shall occur at the local police department. Mail verification shall occur by signing a verification form sent out annually by the Criminal History Systems Board. Failure to register or verify may be grounds for revocation of probation or parole. Failure to register is also an independent criminal offense.

The state also specifies the process to be followed by an offender moving in or out of the Commonwealth or planning to change his address (residential or work) within the Commonwealth.

The obligation to register shall continue for twenty years after conviction, release from custody or supervision, whichever occurs last. If the offender has been convicted of two or more sex offenses committed on different occasions, then the duty to register lasts for life. An offender may apply to terminate his obligation after fifteen years. He must then prove, by clear and convincing evidence that he has not been committed of another sex offense and does not pose a threat to the public safety.

### III. Access to Information

The statute establishes the process by which the registry information will be disseminated to law enforcement agencies.

The public (over age 18) may request access to the Board's information through a personal visit to the police station. The inquirer must provide identification and complete a record of inquiry, designated by the Criminal History Systems Board, which includes verifying that he requests the information for his protection or that of a child or other person in his care or custody. Those making inquiry must be advised that there are criminal penalties for improper use of the information. All records of inquiry must be kept confidential, unless relevant to assist in a criminal prosecution.

When making the inquiry, a person may request information about 1) a specific, named person; 2) whether any sex offender lives or works within one mile of a specific address; or 3) whether any sex offender lives or works on a specific street. If the search of the Registry is positive, the police department shall release to the inquirer the name, home and work address, other descriptive identifying information, including photograph, date of conviction and charges of which the offender was convicted.

### IV. Risk Assessment

The sex offender registry board, a subdivision of the Criminal History Systems Board, shall develop guidelines to assess the risk posed by an offender and assign a risk level to each offender.

Level One – low risk of reoffense – public, if requested, may have access to registry information – as described above.

Level Two – moderate risk of reoffense – police department must notify community groups likely to encounter offender. Must provide the information described in II above.

Level Three – high risk or reoffense – police department must notify community groups and individuals likely to encounter the offender. Some identifying information as Level Two regarding the offender to be provided to those persons.

### V. Police Immunity

The statute grants police officials and public employees acting in good faith immunity from liability in any civil or criminal proceeding (under state law) for providing or failing to provide registry information.

# GUIDELINES FOR MEASURING SQUARE FOOTAGE OF LIVING AREA

- RANCH                      Foundation length x width = Square footage house
- SPLIT ENTRY              Upper level length x width = Square footage of house  
Do not include finished rooms or finished areas in basement.  
They should be explained in comments.
- TRADITIONAL CAPE      With no shed dormer-  
(a) 1<sup>st</sup> floor foundations length x width = 1<sup>st</sup> floor square footage.  
(b) PLUS foundation length x width x 60% = upper floor square footage  
Total of a + b = square footage of house
- GAMBREL                  (a) Foundation length x width = 1<sup>st</sup> floor square footage  
(b) Foundation length x width x 90% = upper floor square footage  
Total a + b = square footage of house
- STRAIGHT FRONT COLONIAL      Foundation length x width x 2 = square footage of house
- GARRISON                  (a) Foundation length x width = 1<sup>st</sup> floor square footage  
(b) Second floor length x width = 2<sup>nd</sup> floor footage  
Total of a + b = square footage of house
- COMMENT: Typical overhang on garrison type homes 1/2 lf overhang on front and rear, add three feet
- NOTE: Garage and/or breezeway (porch) dimensions not be included. "Living Area" requires heat.

## PLEASE NOTE:

These are guidelines only and the REALTOR® is ultimately responsible for the accuracy of his/her measurements and calculations.

# TITLE V

## Q & A PROPERTY TRANSFERS

Q. When are title 5 on-site sewage disposal system inspections required?

**A. Inspections are required:**

- When a facility is to be sold to new owners, or there otherwise is transfer of title, except between spouses;
- When facilities are divided or combined together;
- When there is a change in use or an expansion of the facility;
- For large systems (10,000 gallons per day or more), shared systems, and systems on a condominium with five or more units, on a periodic basis; or
- When DEP or the local approving authority orders an inspection.

Inspections are necessary to ensure the proper operation, upgrade and maintenance of on-site sewage disposal systems. The new Code, therefore, requires inspections to be done periodically in certain circumstances. Most inspections will occur as a result of property transfers when facilities are sold, divided or combined. In order to provide further guidance to the regulator community, this document is intended to clarify the regulatory intent of the department.

**Q. For how many months is the system inspection “valid”?**

A. For most property transfers, the inspection must occur at or within two years prior to the time of transfer. If a system has been pumped on an annual basis and pumping records are available, then the inspection is valid for three years. If weather conditions prevent inspection at the time of transfer, the inspection must occur as soon as weather permits, but in no event later than six months after the transfer, provided that prior to or at the time of transfer the seller notifies the buyer in writing of the requirements contained at 310 CMR 15.300 through 15.305 for inspection and upgrade, if necessary.

**Q. Is an inspection required in a foreclosure situation?**

A. In a foreclosure situation, inspections must occur within two years before or six months after the execution of the memorandum of the sale (irrespective of whether the foreclosing institution, the loan guarantor, the loan servicer, an unaffiliated third party, or any combination thereof, is/are executing such memorandum of sale) or delivery of the deed in lieu of foreclosure to the foreclosing institution or the loan servicer. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time. To the extent that foreclosing institutions or loan servicers have contractually allocated responsibility for the inspection to the unaffiliated third party or the loan guarantor acquiring the property within the specified timeframes, such foreclosing institutions or loan servicers will not be responsible for inspection of the system(s). Entities foreclosing on properties are required to notify those who acquire title of the inspection and upgrade requirements contained at 310 CMR 15.300 through 15.305, in writing, prior to or at the time of transfer.

**Q. What if the system was inspected and I want to resell the property, do I have to have it inspected again?**

A. If an inspection was conducted within the applicable timeframe, the inspection may fulfill the inspection requirement for more than one transfer of title, and need not be repeated. For most properties, inspection must have occurred within two years prior to the transfer (three years when a system has been pumped on an annual basis and pumping records are available).

**Q. Who must obtain the inspection and who receives the results?**

A. Under Title 5, the property owner or facility operator is generally responsible for obtaining an inspection of the system. Prior to the time of the transfer of title, however, the parties may contractually allocate responsibility for the inspection provided that such inspection occurs within the specified timeframes. An inspection must be conducted by an approved System Inspector. If an inspection is required, s/he must

record the inspection results on a DEP-approved inspection form and submit the form, within 30 days of the inspection, to the approving authority. Boards of Health are the approving authority for most systems. DEP is the approving authority for state and federal facilities. Also, for large and shared systems, the System Inspector and the owner must submit the inspection form to DEP. If an inspection is not required, a system owner may perform a voluntary assessment of the condition and operability of the system, in which case the results of the inspection are not required to be submitted to the approving authority.

**Q. With property transfers, does the buyer receive a copy of the inspection report, too?**

A. A copy of the inspection report must be submitted to the buyer or other person acquiring title to the facility served by the system. The inspection is intended to provide sufficient information to make a determination as to whether or not the system in its current condition is adequate to protect public health and the environment. The inspection, however, is not designed to provide information to demonstrate that the system adequately will serve the use of the new owner.

**Q. How does the inspection requirement apply to the following types of property transfers?**

A. The following types of transfers, among others, require an inspection within the applicable time frames:

- **Inheritance by will or intestacy** (without a will)- with the exception of inheritance by a spouse which would not require an inspection, inspection of the system must occur within two years before or one year after the will being allowed by the probate court and the appointment of the executor or within two years before or one year after the appointment of an administrator if the deceased dies intestate regardless of whether the property passes specifically or as part of the residue of the estate. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time. Executors or administrators are required to notify, in writing, those who acquire title of real property from an estate of the inspection and upgrade requirements contained at 310 CMR 15.300 through 15.305.
- **Legal life estate or an interest for life in trust**- inspection of the system must occur within two years before or six months of the death of the life tenant or the expiration of a present interest in trust for a term of ten years. If a successive life interest or an interest in trust for a term of years passes to a spouse, the inspection must occur within two years of the death of the last surviving spouse or the expiration of a present interest in trust to the spouse for a term of two years. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.
- **Inter-family transfers where new parties are involved** (e.g. parents deed property to children)- within two years prior to transfer or if weather conditions prevent inspection at the time of transfer, the inspection must occur as soon as weather permits, but in no event later than six months after the transfer. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.
- **Foreclosure or deeds in lieu of foreclosure**- (see the Answer to Question 3 above).
- **Tax taking either by the federal, state, or municipal government**- Inspections of the system must occur within two years prior to transfer by governmental entity to buyer or within six months after the expiration of the right of redemption, provided that the governmental entity notifies the buyer in writing of the requirements contained at 310 CMR 15.300 through 15.305 for inspection and upgrade, if necessary. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.
- **Levy of execution that results in a conveyance of property**- Inspections of the system must occur within two years prior to officer's deed of debtor's interest to buyer or within six months after the expiration of the right of redemption, provided that the officer notifies the buyer in writing of the

requirements contained at 310 CMR 15.300 through 15.305 for inspection and upgrade, if necessary. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.

- **Bankruptcy**- Inspections of the system must occur within two years prior to transfer by bankruptcy trustee to buyer or within six months after the transfer, provided that the debtor notifies the buyer in writing of the requirements contained at 310 CMR 15.300 through 15.305 for inspection and upgrade, if necessary. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.
- **A change in ownership or the form of ownership where NEW parties are introduced** (e.g. introduction of new beneficiary/ies in a nominee trust; introduction of new joint tenant(s) or new tenant(s) in common; introduction of new parties where property is transferring from joint ownership to nominee or business trust, or where a new general partner is introduced; creation of a legal life estate or an interest for life or for a term of two years in trust for a party other than the creator or his or her spouse, etc.)- Inspection of the system must occur within two years prior to transfer or if weather conditions prevent inspection at the time of transfer, the inspection must occur as soon as weather permits, but in no event later than six months after the transfer, provided that the new party is notified in writing of the requirements contained at 310 CMR 15.300 through 15.305 for inspection and upgrade, if necessary. In a nominee trust situation, whoever has authority to add a new beneficiary is responsible for the inspection. Trustees in the nominee trust situation are advised to notify those with authority of their inspection obligation. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.

NOTE: An exception to this general rule that an inspections required where new parties are introduced is the situation where a transfer occurs between spouses during life, out right or in trust, in which case an inspection is NOT required. Examples of such spousal transfers which do NOT trigger an inspection include: (1) a spouse transfers the real property to the other spouse, individually or into a trust of which the other spouse is the sole or primary beneficiary; or (2) a spouse transfers the real property to him/herself and the other spouse, as joint tenants, tenants in common, or as tenants by the entirety.

- **Sale of a condominium unit** for condominiums consisting of five or more units, all systems must be inspected every three years; for smaller condominiums, instead, the system serving the particular unit transferred may be inspected within two years prior to transfer, or if weather conditions prevent inspection at the time of transfer, the inspection must occur as soon as weather permits, but in no event later than six months after the transfer, provided that the buyer is notified in writing of the requirements contained at 310 CMR 15.300 through 15.305 for inspection and upgrades.

#### **Q. How does the inspection requirements apply to the following types of property transfers?**

A. The following types of transfers do NOT require an inspection:

- **Refinancing a mortgage** or similar instrument, whether or not the identity of the lender remains the same
- **Taking of a security interest** in a property including, but not limited to, issuance of a mortgage
- **Appointment of, or a change in,** a guardian, conservator, or trustee
- **A change in the form of ownership among the same owners,** such as placing the facility within a family trust of which the owners are the sole, present beneficiaries, or changing the proportionate interests among a group of owners or beneficiaries.
- **Adding or deleting a spouse as an owner or beneficiary,** or a transfer between spouses during life, out right or in trust, or the death of a spouse.

- **Any other change in ownership** or the form of ownership where NO NEW parties are introduced (e.g., from spouses jointly or as tenants by the entirety to one spouse either for estate planning purposes or pursuant to a divorce settlement or court order, from joint ownership to nominee or business trust, or into limited or general partnership, etc.)
- **Transfer within two years of issuance of Certificate of Compliance-** this includes systems constructed or upgraded prior to March 31, 1995.
- **Owner of the facility or person acquiring title has signed an enforceable agreement** with the approving authority to upgrade the system or to connect the facility to sanitary sewer or a shared system within the two years following the transfer of title, provided that such agreement has been disclosed to and is binding on the subsequent owner(s).
- **Facility is subject to a comprehensive local plan of onsite septic system inspection** approved in writing by the Department and administered by a local or regional governmental entity; and the system has been inspected at the most recent time required by the plan

**Q. When do large and shared systems need to be inspected?**

A. Shared systems must be inspected annually. Large systems, that is, systems with a design flow of 10,000 gallons per day or more at full buildout, must be inspected by December 1, 1996, and then reinspected once every three years.

**Q. What is required in connection with changes of use and expansions?**

A. A system must be inspected upon any change in use or expansion of use (if the expansion of use results in an increase in flow to the system such as adding a bedroom) of the facility served if a building permit or occupancy permit from the local building inspector is required for such change in use or expansion. Any change in the footprint of a building will also require an inspection to determine the location of the system to ensure that construction will not be placed upon any system components or on the reverse area of the system, unless official records are available to determine the location of the system components.

**Q. Is an inspection required in the context of new construction?**

A. Issuance of a Certificate of Compliance by the approving authority (generally the Board of Health, the Department in the case of state and federal facilities) upon completion of the system in new construction satisfies the inspection requirement. Certificates of Compliance issued in the expansion or upgrade contexts will also satisfy the inspection requirement. Issuance of such certificates of compliance shall satisfy the requirement for inspections prior to transfer of title for a period of two years.

***THIS DOCUMENT IS INTENDED FOR INFORMAL, INFORMATIONAL PURPOSES ONLY. IN THE EVENT OF ANY CONFLICT OR DISCREPANCY BETWEEN THE INFORMATION CONTAINED HEREIN AND ANY REGULATION OR LAW, INCLUDING BUT NOT LIMITED TO, 310 CMR 15.000, TITLE 5, THE REGULATION SHALL PREVAIL.***

# **UNDERGROUND TANK REMOVAL CHECKLIST**

## **STEP 1 – DO YOUR HOMEWORK**

Ask your local fire protection officer about...

- Any local rules that may be more stringent than what state law requires; and
- Requirements for measuring for the presence of contamination.

## **STEP 2 – HIRE A CONTRACTOR**

Shop around...

- Seek tank removal company referrals from your...
  - Oil company;
  - Local public works department;
  - Neighbors;
  - Yellow Pages directory (look under Oil Tanks or Tank Services)
  - Local Fire Department; or
  - The Massachusetts Oilheat Council at (617) 237-0730.
- Compare costs (prices are higher for removals of tanks that are large and difficult to reach);
- Compare services (the basic services a contractor should provide are listed in STEP 3 below);
- Check references; and
- Ask your oil company if it will credit you for any unusable fuel that is removed from your tank.

Make sure the contractor you select...

- Understands the state regulations (527 CMR 9.00, 502 CMR 3.00) and any local rules governing any underground tank removals;
- Is able to inspect the tank and identify possible signs of contamination;
- Provides a written contract with a specific cost estimate based on property conditions; and
- Is insured to perform such work.

## **STEP 3 – THE TANK REMOVAL**

**Your removal contractor should...**

- Obtain all required permits;
- Empty oil from the tank and clean out all residues or arrange for someone else to perform the work;
- Excavate the tank and piping;
- Dispose of the tank, piping, residues, soil and any remaining oil at locations that are authorized to accept them;
- Check for signs of a leak and report findings to you (see STEP 4);
- Separate clean soil from any that appears to be contaminated;
- Backfill the hole to grade; and
- Provide written documentation of the removal, including disposal or recycling records for the tank, fuel, residues, and contaminated soil (if any).

**Your local fire department should...**

- Observe the removal;
- Ensure that the tank and surrounding area are free of safety hazards;

- Ensure that a measurement for contamination is made; and
- Note on the removal permit both the condition of the tank and whether any contamination was observed.

**You should...**

- Observe the tank removal from a safe distance;
- Record any problems that are encountered by the contractor; and
- Take notes and photos to document the work, even if everything seems to be going well.

**STEP 4 – THE CONTAMINATION MEASUREMENT**

State law requires that a measurement for contamination be taken within 24 hours of the time a tank is removed from the ground or cleaned, filled and left in place. The measurement can be performed by the tank contractor or an environmental professional. You should observe the inspection and obtain written observations from people at the scene, including the contractor and fire officials, even if the tank and piping appear sound and there are no signs of contamination.

***The basic measurement includes...***

- Recording the condition of the tank, piping and soil;
- Checking the tank and piping for holes;
- Examining the feedline and soil surrounding it;
- Checking the excavated area for visible oil stains or strong odors;
- Noting problem areas on a drawing or map of the excavation;
- Photographing the area to support written documentation;
- Taking a composite sample to be analyzed for petroleum constituents if;
  - a) The condition of the tank, piping, or soil indicates a leak may have occurred;
  - b) Your tank is located near a well, water supply, wetland, pond, or stream; or
  - c) You want a record of analytical results to confirm that no contamination was found.

The local fire department will specify the procedures for taking the contamination measurement when a tank is to be cleaned, filled and left in the ground.

**STEP 5 (if necessary) – REPORT LEAKS OR SPILLS**

State law requires that you report certain petroleum releases or threats of release to DEP and the local fire department (depending on the nature and volume of the release, as well as contamination levels). DEP can help you in determining whether a particular situation requires reporting. Should any contamination be observed during the removal of your tank, contact the fire department (as well as the board of health if required by local ordinance) and notify the DEP regional office nearest you:

<b>Springfield</b>	<b>(413) 784-1100</b>
<b>Worcester</b>	<b>(508) 792-7653</b>
<b>Woburn</b>	<b>(617) 932-7681</b>
<b>Lakeville</b>	<b>(508) 946-2850</b>

- Consult with local DEP officials before proceeding with any further cleanup work. In most cases, the tank removal will not have to be halted.
- Do not, under any circumstances, allow your contractor to excavate to a point where the structure of your home is compromised.
- Any soil suspected of being contaminated should be separated from soil that appears to be clean (so you will not be paying for the disposal of clean soil).
- If needed, hire an environmental consultant to ensure proper assessment and cleanup. DEP can advise you on whether this is necessary.
- Check with your insurance agent to see if you are covered in the event of an oil spill or leak at your home.

## STEP 6 – KEEP GOOD RECORDS

It is important to maintain complete records of the tank removal, inspection process, and any necessary cleanup work. Keep them in a safe place with your other important records. You may be asked to produce them later if you sell your property, obtain financing, or file an insurance claim. Your documentation should include:

- Shipping records documenting recycling or disposal of the tank, piping, residues, soil and fuel;
- An accurate drawing showing where the tank was located;
- Contamination measurement results, including any analytical results, if samples are taken;
- Documentation of any cleanup work, if performed;
- Your own notes and photos taken during the removal, inspection and cleanup (if necessary); and
- Written observations from people at the scene, including the contractor and fire officials.

# **WETLANDS PROTECTION IN MASSACHUSETTS**

Wetlands are found throughout the state, from the Atlantic coast to the Berkshires. Wetlands help clean drinking water supplies, prevent flooding and storm damage, and support a variety of wildlife.

What are wetlands? Coastal wetlands are directly adjacent to the ocean and include beaches, salt marshes, dunes, coastal banks, rocky intertidal shores, and barrier beaches. Inland wetlands are areas where water is at or just below the surface of the ground. Although these wetlands can appear dry during some seasons, they contain enough water to support certain plants and soils. Inland wetlands include marshes, wet meadows, bogs and swamps.

While we now recognize the benefits of wetlands, that recognition has come late. Since Colonial times, almost one third of Massachusetts adopted the nation's first wetland protection laws in the early 1960s. Today, wetlands are protected by state and federal laws.

## **Wetlands Protection Program**

The Wetlands Protection Act [Massachusetts General Laws (MGL) Chapter 131, Section 40] protects wetlands and the public interests they serve, including flood control, prevention of pollution and storm damage, and protection of public and private water supplies, groundwater supply fisheries, land containing shellfish, and wildlife habitat. These public interests are protected by requiring a careful review of proposed work that may alter wetlands. The law protects not only wetlands, but other resource areas, such as land subject to flooding (100-year old floodplains), the riverfront area (added by the Rivers Protection Act), and land under water bodies, waterways, salt ponds, fish runs, and the ocean.

At the local level, the community's conservation commission administers the Wetlands Protection Act. The commission is a volunteer board of three to seven members appointed by the selectmen or city council. On the state level, the Department of Environmental Protection (DEP) oversees administration of the law. DEP develops regulations and policies, and provides technical training to commissions. DEP also hears appeals of decisions made by commissions.

The conservation commission ensures that proposed activities will not alter resource areas and the public interests they provide by reviewing projects on a case-by-case basis according to regulation [310 Code of Massachusetts Regulations (CMR) 10.00]. These regulations describe how each type of resource area provides one or more of the public interests. The regulations also spell out the type and extent of work allowed in resource areas. Proposed work must meet these standards. This information helps landowners and developers plan their work and helps commissions apply the law to specific projects.

The law regulates many types of work in resource areas, including vegetation removal, regrading, and construction of houses, additions, decks, driveways, and commercial or industrial buildings. If you want to work in a wetland resource area within 100 feet of a wetland (an area called the buffer zone), contact the conservation commission before you start work.

If you are unsure whether your proposed work site is in a resource area or whether the work will alter a resource area, you can apply for a Request for Determination of Applicability. If the conservation commission determines that the work will alter a resource area, you must file an application, called a Notice of Intent (NOI), and pay an application fee.

The NOI requires a plan describing the details of the proposed project, location of wetland resource areas and buffer zones, and measures to be taken to protect them. This information can be found in the regulations and application instructions. Contact the conservation commission for guidance on the content and detail needed in plans.

The commission will visit the site to verify the resource area boundaries on the property. At a public hearing on the project, the applicant may present information, and abutters and other members of the public may ask questions.

Following the hearing, the commission will issue a permit, called an Order of Conditions. The Order will either approve the project—with special conditions that will protect the public interests – or deny the project if impacts to resource areas cannot be avoided or mitigated.

The applicant, landowner, any aggravated person, abutter, group of 10 citizens, or DEP may appeal the local commission's decision to DEP.

### **Wetland Restrictions**

Permanent restriction orders have been placed on selected wetlands in over 50 communities under the Inland and Coastal Wetland Restrictions Acts (MGL Chapter 131, Section 40A, and MGL Chapter 130, Section 105). The restriction orders provide added protection for selected wetlands by prohibiting certain activities in advance of any work being proposed. The regulations for these laws are 310 CMR 12.00 (coastal).

The restriction orders have been recorded at the Registries of Deeds in the counties where the properties are located to inform future landowners of the restriction. Affected municipalities should have a copy of the community's restricted wetland plans and restriction orders.

Restriction orders are implemented through the Wetlands Protection Act permitting process. A landowner proposing work in a restricted wetland must file a Notice of Intent (NOI) and check the appropriate box on the form. Upon receipt of the NOI, the conservation commission and DEP regional office should check their copies of the restricted wetlands plans and restriction and if the work is allowed under the restriction order. Orders of Condition must not allow work that is prohibited by a restriction order.

### **401 Water Quality Certification Program**

Under Section 401 of the federal Clean Water Act, activities proposing discharges to water bodies or wetlands require a state Water Quality Certification. DEP must certify that projects requiring federal permits will not violate the state's water quality standards, which include protection for wetlands. Discharges include dredging, filling, and other activities that cause the loss of wetlands, and require permits for the U.S. Army Corps of Engineers (Corps). The Corps has established a simplified permit system in Massachusetts.

The regulations for the 401 Water Quality Certification Program (314 CMR 9.00) have been coordinated with the Wetlands Protection Act regulations. As a result, most projects approved by the local conservation commission under the Wetlands Protection Act do not need further state review under the 401 Program. These projects are automatically certified when they obtain an Order of Conditions.

However, some types of projects, including those with potentially large wetland impacts and those that are not subject to the Wetlands Protection Act, require a 401-application review. In these cases, DEP may require additional protection for wetlands where necessary to ensure compliance with the water quality standards.

DEP's Wetland Protection Program reviews 401 applications for wetland projects. DEP notifies the applicant when he or she files a Notice of Intent if the project also requires a 401 application. Landowners with projects that are not subject to the Wetlands Protection Act should contact DEP for 401-application information. The 401 Program and wetlands program procedures have been coordinated to streamline review. When appropriate, applicants are encouraged to submit both applications simultaneously and to design projects, which meet the standards of both programs.

### **Local Wetland Bylaws**

Over 100 Massachusetts communities have wetlands protection bylaws in addition to the state and federal laws described here. Contact the conservation commission at your city or town hall for more information about local bylaws.

### **For more information about:**

Wetland laws in Massachusetts, call the conservation commission at your city or town hall. Or, call DEP's Wetlands Protection Program in Boston at 617/292-5695 or DEP's Regional Service Center at:

- Northeast (Woburn): 617/932-7677
- Southeast (Lakeville): 508/946-2714
- Central (Worcester): 508/792-7683
- Western (Springfield): 413/784-1100

Conservancy Program wetlands maps, call 617/292-5907  
U.S. Army Corps of Engineers permits, call 1/800/362-4367